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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

ELIZABETH RASK,

Petitioner,

v.

FRESENIUS MEDICAL CARE NORTH AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has an employee who told her supervisor that she suffers from depression, is medicated for it and needs to see her doctor because of problems she is having with side effects from the medication provided sufficient notice of a serious health condition to qualify the absences for Family and Medical Leave Act protection?

2. Is the provision of time off from work to have medications adjusted for a mental health disability a reasonable accommodation required by the Americans with Disabilities Act?

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OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at *Rask v. Fresenius Medical Care North America*, 509 F.3d 466 (8th Cir. 2007). The Eighth Circuit therein affirmed the opinion of the District Court reported at *Rask v. Fresenius Medical Care North America*, No. 05-1267, 2006 WL 3060143 (D. Minn. Oct. 26, 2006). *See* Appendix for the full text of both opinions.

JURISDICTION

The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The Eighth Circuit's opinion was rendered on December 6, 2007. Corrected opinions were issued on December 11, 2007, and December 13, 2007. A Petition for Rehearing filed by Petitioner was denied on January 18, 2008.

STATUTORY PROVISIONS INVOLVED

29 C.F.R. Part 825.303(b), Family and Medical Leave Act

Regulations of the U.S. Department of Labor, Notice to Employer of Serious Health Condition

The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be

expected to obtain any additional required information through informal means.

29 C.F.R. § 825.114(a)(2)(iii), Family and Medical Leave Act

Regulations of the U.S. Department of Labor, Applicable Definition of "Serious Health Condition"

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

29 C.F.R. § 825.114(a)(2)(i), Family and Medical Leave Act

Regulations of the U.S. Department of Labor Defining "Period of Incapacity"

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom)[.]

EEOC REGULATIONS ON THE AMERICANS WITH DISABILITIES ACT (ADA)

Because of their voluminous nature, relevant ADA statutory provisions and Equal Employment Opportunity Commission (EEOC) regulations on the ADA are included in the appendix and not reproduced here.

STATEMENT OF THE CASE

This case is on appeal from the decision of the Eighth Circuit affirming the summary judgment of the District Court dismissing Petitioner's lawsuit in its entirety. The District Court's jurisdiction arose under 28 U.S.C. §1331 with federal questions involving the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). Jurisdiction over ADA claims is found in 42 U.S.C. § 12117(a), which incorporates by reference the jurisdictional authority for Title VII under 42 U.S.C. §2000e-5(f)(3). Jurisdiction over FMLA actions is found in 29 U.S.C. § 2617(a)(2).

Petitioner Elizabeth Rask has been treated for severe depression for most of her adult life. She worked successfully for Fresenius Medical Care North America and its predecessor for six years before her employment was terminated on June 2, 2004. She was told she was terminated because of her absences from work on May 10, 2004, May 28, 2004, and a shortened work day on March 22, 2004. Rask testified that the reason for each of these missed days was that she had been put on a new medication for depression and was having problems adjusting to the medication. These problems included a serious loss of concentration, inability to think clearly, uncontrollable crying spells, and significant inability to sleep. Rask was under the care of a psychiatrist at this time and her testimony was backed up by her medical records and the affidavits of those who knew her during this period.

When Rask started her employment she completed a pre-employment physical in which she informed her employer of her depression and the fact that she was taking the anti-depressant Prozac for it. Rask had also told her supervisor and her supervisor's manager of her depression and her requiring medication for its treatment.

For the vast majority of her work life at Fresenius, Rask's depression did not interfere with her ability to work. In the spring of 2004, however, the company was undergoing an extremely stressful union organizing drive that lead to exacerbation of her depression. She sought medical attention, as she had in periods of stress throughout her adult life, had her medications changed and began a new medication regime that failed to help her.

Rask's employment was terminated for attendance on June 2, 2004. Prior to this, however, Rask told her supervisor that she needed to see her doctor on May 28, 2004, to have her medications adjusted. She testified, "I talked to Patty [her supervisor] and I said, 'Patty, I'm having -- I talked to my doctor and they want me to come in tomorrow, I won't be able to work. I need help with my medication still, I'm still having a lot of side effects from what they put me on.'"

On June 4, 2004, two days following her termination, Rask's psychiatrist wrote a letter on her behalf to Fresenius, which was faxed to Fresenius on June 14, 2004. In this letter, Dr. Cohen wrote:

> Elizabeth Rask is a patient of mine who is being treated for Major Depression, single episode. Elizabeth has been having symptoms of depression for quite some time and is being treated with medications. She has had severe side effects from the medication, as well as continued symptomology.
>
> It is my belief that due to Elizabeth's continued symptomology, as well as side effects from the medication, it has been very difficult for her to function on a day-to-day basis. Due to her difficulty functioning, it is also my opinion that she has been unable to work on occasion and it was necessary for her to take time off from work.

At the time of her termination, Fresenius was overstaffed in her position at the location she worked at. Further, Rask had 48.5 hours of unused personal time off (PTO) that she had earned from her service to Fresenius. Fresenius also had a policy in place allowing for use of PTO time for Extended Sick Leave. According to the handbook given to employees, "[t]he Extended Sick Leave (ESL) policy is the part of the PTO program that allows you to receive pay during extended absences due to personal injury or illness." Rask was never offered Extended Sick Leave as an accommodation and her PTO time was simply paid out in full at her termination.

The company had in place an employment handbook that gave only a barebones description of

the rights employees had under the FMLA. It did not discuss mental health impairments or offer the possibility of intermittent FMLA leave in its explanation of the law. Further, Rask was told by her supervisor that it would not do not any good to provide doctor's notes for her absences because they would still be counted as an attendance occurrence regardless of the note.

Rask has sued alleging violation of her rights under the Americans with Disabilities Act (ADA), the Minnesota Human Rights Act (MHRA) and the Family and Medical Leave Act (FMLA).

REASONS FOR GRANTING THE PETITION

A. The Court Of Appeals Has Decided Important Questions Of Federal Law That Have Not Been, But Should Be, Settled By This Court

In an interpretation of the FMLA that is unsupported by any precedent, statute or federal regulation, the Eighth Circuit determined that notice to an employer of an employee's underlying mental health condition that required a continuing course of treatment by a mental health provider was not sufficient to trigger the protections of the FMLA. The Court reasoned that it was not the underlying condition that caused her absence, but the side effects of the medication she took for the condition, which the Court then found did not qualify separately as a "serious health condition" under the FMLA.

> We conclude that there is no evidence in the record that Ms. Rask at any point gave her supervisors any details about her depression, its severity, or any incapacity that it might give rise to, sufficient to indicate that it, as opposed to the side effects from her medication, was serious. The side effects in this case are not covered by the FMLA because there was no evidence that they were a "chronic health condition."

Rask, 509 F.3d at 473.

The surgical distinction applied by the Eighth Circuit between the depression and the side effects from medication for the depression is both unique in FMLA law and a matter of widespread concern for the future of the FMLA itself. It places at risk the protection of intermittent FMLA leave for the mass of claimants who are in treatment for a serious health condition and suffer side effects from the treatment. Three examples illustrate this concern:

Example One. An employee with cancer undergoing chemotherapy is able to work on most days, yet required time off on one or two days because of extreme nausea caused by the drugs. An employer, now applying *Rask*, terminates saying "you were only certified for FMLA because you had cancer, not because of the effects of the treatment you would

receive for it. Your doctor's course of treatment is really what is causing your absence."

Example Two. A warehouse laborer recovering from back surgery cannot return to work because drowsiness from the pain killer she is on would temporarily prevent her from operating a forklift. The employer's policies forbid operating heavy equipment while on such medication. The employer who before might have provided FMLA, terminates instead, arguing that it is not the back condition that prevents her from returning to work, but rather the side effects of the medication.

Example Three. An account executive suffers heart failure and requires a hospital stay and the implantation of a pacemaker. Upon returning to work, the executive has an episode because the device has a faulty lead, sending the executive on no notice back to the operating room. Upon replacement of the lead, the executive is ready to return to work. The employer now terminates, contending it is not the heart condition that caused the absence, but a temporary problem with a faulty medical device.

It is arbitrary to separate the effects of treatment from the reason for treatment. The Equal Employment Opportunity Commission (EEOC) has rejected such an approach in the context of examining reasonable accommodations under the Americans with Disabilities Act (ADA), stating in its enforcement guidance that "[t]he side effects caused by the medication that an employee must take because of the disability *are limitations resulting from the disability*. Reasonable accommodation

extends to all limitations resulting from a disability." *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, 2002 WL 31994335 at *26 (emphasis added). No less a standard is appropriate under the FMLA.

Only Supreme Court review can eliminate this arbitrary and unprecedented distinction which threatens FMLA leave for countless thousands of Americans. If the distinction is removed, the question of notice to the employer of a serious health condition is also removed, or at a minimum becomes a genuine issue of material fact inappropriate for summary judgment, and the FMLA claim must be reinstated.

B. The Court Of Appeals Has Entered A Decision In Conflict With The Decision Of Another United States Court Of Appeals, as Well as EEOC Guidance, On The Same Important Matter

The Eighth Circuit's decision establishes an unprecedented rule that a request by a disabled person for time off on short notice is an unreasonable accommodation not required to be provided by the ADA. The decision draws the distinction between "adjustments or modifications [that are] job related, and those that "assist[] the individual throughout his or her daily activities, on and off the job", and finds that requests for time off fit the latter category and are therefore unreasonable accommodations. *Rask*, 509 F.3d at 471. This new exclusionary rule runs

contrary to the decisions of other Circuits, as well as EEOC interpretative guidance, that allow time off from work as a reasonable accommodation. *Hankins v. The Gap, Inc.*, 84 F.3d 797, 801 (6th Cir.1996) ("paid sick leave, paid personal days, a voluntary time off program, and ample and flexible vacation time" constitute reasonable accommodation); *Dark v. Curry County*, 451 F.3d 1078 (9th Cir., 2006)("there remains a genuine issue of material fact as to whether Dark could reasonably have been accommodated by his request for leave sufficient to permit his transition to new medication."); *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir.1996), ("[A] reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation."); 29 C.F.R. Part 1630, Appendix to Part 1630--Interpretive Guidance to Title I of the ADA, § 1630.2(o) (reasonable accommodations "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment").

The Eighth Circuit misapplies EEOC interpretive guidance in devising its rule against absences as a reasonable accommodation. *Rask*, 509 F.3d at 471. The EEOC guidance cited by the Court states that "an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related, such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities." 29 C.F.R. Part 1630, App. at §1630.9.

The EEOC guidance, however, is only negating the suggestion that an employer must provide certain tangible physical items as a reasonable accommodation; it never addresses giving time off to get medications adjusted as a "personal item that the employer is not required to provide." *Rask, supra.*

The Eighth Circuit's new direction is an invitation to denial of reasonable accommodations to disabled employees who need time off to see a doctor. Employers in the Eighth Circuit will now argue that time off always in some way benefits the employee personally and therefore need not be provided. This is contrary to the statutory scheme of the ADA, which looks only at whether the accommodation allows the employee to perform the essential functions of her job, not whether it also benefits the employee in some personal way as well. 42 U.S.C. § 12112(b)(5)(A). Rask sought adjustment to medications that would allow her to be productively employed. Her case, as the decisions of the other Circuits attest, embodies the very spirit of the ADA in trying to keep disabled workers gainfully employed.

The Holding on Sufficiency of Notice Runs Contrary to EEOC Regulations

The Eighth Circuit's holding that "no reasonable person could find that Ms. Rask 'specifically identif[ied] her 'resulting limitation'" when she told her employer "I might miss a day or two here and there", stated in the context of her need to see the doctor for medication management, runs contrary to EEOC regulations finding similar

statements to be valid requests for reasonable accommodation. *Rask,* 509 F.3d at 470.

The EEOC enforcement guidance states that "[w]hen an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.' Example A: An employee tells her supervisor, *'I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing.'* This is a request for a reasonable accommodation." 2002 WL 31994335, at *3 (emphasis added). The EEOC's guidance for the ADA, "'while not controlling upon the courts by reason of [its] authority, do[es] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 672 (1st Cir. 1995) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)).

The Eighth Circuit's decision is at odds with the decisions of other Circuits and EEOC guidance and will generate uncertainty and inconsistent application of the law unless the Supreme Court intervenes.

III.

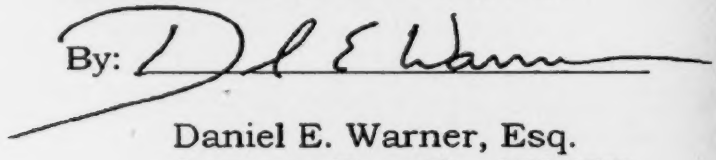
CONCLUSION

Based upon the foregoing, Petitioner requests that the Court grant her petition.

Dated: April 9, 2008.

Respectfully submitted,

WARNER LAW OFFICE, P.A.

By: 

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APPENDIX A

CIRCUIT COURT OPINION

Elizabeth RASK, Appellant,
v.
FRESENIUS MEDICAL CARE NORTH AMERICA, Appellee.
No. 06-3923.

United States Court of Appeals, Eighth Circuit.
Submitted: September 27, 2007.
Filed: December 6, 2007.
[509 F.3d 469]

Daniel Eric Warner, argued, Inver Grove Heights, MN, for appellant.

Marko J. Mrkonich, argued, Minneapolis, MN (Sandro Garofalo, on the brief), for appellee.

Before COLLOTON, ARNOLD, and GRUENDER, Circuit Judges.

ARNOLD, Circuit Judge.

After Elizabeth Rask was dismissed from her job, she sued her former employer, Fresenius Medical Care North America, under the Americans with Disabilities Act (ADA), see 42 U.S.C. §§ 12101-12213, the Minnesota Human Rights Act (MHRA), see Minn.Stat. §§ 363A.01-363A.41, and the Family and Medical Leave Act (FMLA), see 29 U.S.C. §§ 2601-2654. The district court [fn1] granted summary judgment in favor of Fresenius, Rask v. Fresenius

Med. Care North America, No. 05-1267, 2006 WL 3060143 (D.Minn. Oct.26, 2006), and Ms. Rask appealed. We affirm.

Ms. Rask worked as a patient care technician at two of Fresenius's kidney dialysis clinics in Minnesota. Following a series of disciplinary and attendance problems, Fresenius terminated her employment when she failed to come to work on 28 May 2004. Ms. Rask had a long history of depression, and she filed an action claiming that her depression was a disability and that termination of her employment constituted discrimination under the ADA and the MHRA. She also claimed that some of the days when she did not come to work were covered medical leave under the FMLA.

I.

The ADA prohibits employers from discriminating against a "qualified individual with a disability," 42 U.S.C. § 12112(a), whom it defines as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," 42 U.S.C. § 12111(8). To make out a prima facie case of employment discrimination under the ADA, a plaintiff must establish that she is disabled within its meaning, that she is qualified to perform the essential functions of her job with or without reasonable accommodation, and that she suffered an adverse employment action in circumstances that give rise to an inference of unlawful discrimination based on disability. Dropinski v. Douglas County, Neb., 298

F.3d 704, 706-07 (8th Cir.2002). Apart from one difference, which is not relevant here, an MHRA claim proceeds the same way as does a claim under the ADA. Kammueller v. Loomis, Fargo & Co., 383 F.3d 779, 784 (8th Cir.2004).

Although the parties hotly contested the question of whether Ms. Rask's depression is a disability, we conclude that we need not resolve that matter because Ms. Rask failed to show that she was qualified to perform the essential functions of her job. We have "consistently held that regular and reliable attendance is a necessary element of most jobs," and we see no reason to hold otherwise in the circumstances of this case. See Pickens v. Soo Line R.R. Co., 264 F.3d 773, 777 (8th Cir.2001) (internal quotation marks and citations omitted), cert. denied, 535 U.S. 1057, (2002). While there is evidence in the record that Fresenius had sufficient manpower to staff its operations without Ms.

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Rask, Ms. Rask made no showing that Fresenius would be able to do so on short notice at times when Fresenius expected her to be at work. We note that Ms. Rask did not have the type of job that could be performed from another site or put off until another time: she cared for seriously ill patients in need of dialysis. *Cf. Jackson v. Veterans Admin.*, 22 F.3d 277, 279 (11th Cir.1994). After having a history of unpredictable absences, Ms. Rask admitted that she was unable to come to work on a regular and reliable basis when she told her supervisors, "I'm having problems with my medication and ... I might miss a

day here and there because of it." As discussed below, the specific circumstances of her employment demonstrate that this statement referred to Ms. Rask taking unexcused absences on short notice. Ms. Rask therefore has failed to show that she was qualified to perform the essential functions of her job without an accommodation.

Ms. Rask would nonetheless be qualified under the ADA if a reasonable accommodation would allow her to perform the essential functions of her position. We hold, however, that Fresenius had no duty to accommodate Ms. Rask because she failed as a matter of law to provide sufficient notice of her need. The standard is clear: Where, as here, "the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee ... to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations." Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681, 689 (8th Cir.1998) (emphasis in original) (internal quotation marks and citation omitted), cert. denied, 526 U.S. 1004, 119 S.Ct. 1141, 143 L.Ed.2d 209 (1999).

A major point of dispute between the parties was whether Ms. Rask provided Fresenius notice of the fact that she was depressed at all. Assuming that she did tell her employer that she was diagnosed with depression, her claim still fails under the criteria laid out in Wallin. The closest that Ms. Rask came to satisfying the Wallin requirements was in a

meeting with two of her supervisors: She attested that she "let them know that I'm having problems with my medication and, you know, would you stand by me, I might miss a day here and there because of it." Even if having problems with medication were a specific identification of a disability, which we doubt, and even if "I might miss a day here and there" were a suggestion of what a reasonable accommodation might be, no reasonable person could find that Ms. Rask "specifically identifl[ied]" her "resulting limitations," id.

The point of requiring an employee to provide this kind of information is to allow the employer to understand that the employee suffers from a disability. Without this information the employer is unable to engage in the interactive process required to determine what accommodations might be appropriate and available. See 29 C.F.R. pt. 1630, app. at § 1630.9. Because Ms. Rask did not inform Fresenius of the specific limitations that her depression gave rise to, Fresenius had no duty to find an accommodation for her.

We believe, moreover, that even if what Ms. Rask told her employer put it on notice that she was disabled, she did not, in fact, suggest accommodations that were "reasonable," Wallin, 153 F.3d at 689. Allowing her to be absent cannot as a matter of law be a reasonable accommodation given the circumstances of Ms. Rask's employment. It is undisputed that Ms. Rask

[509 F.3d 471]

was allowed to modify the number of hours that she worked at will. There is also no dispute that at the time of the meeting with her supervisors mentioned above she was working only two days a week. She therefore already had a lot of time away from work and could take more if she needed it. Talk of having to miss days in this context can refer only to sudden unanticipated absences on the few days when Ms. Rask was actually scheduled to work. The duty to accommodate "does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide." 29 C.F.R. pt. 1630, app. at § 1630.9. The ability to take sudden, unscheduled absences would not have assisted Ms. Rask in performing the duties of her particular job; they would have been for her personal benefit. Ms. Rask therefore failed to suggest a reasonable accommodation.

Ms. Rask was required to show that she could perform the essential functions of her job either with or without a reasonable accommodation. After having had a history of unexpected absences, she admitted that she could not come to work on a regular and reliable basis, which was essential for her position. Ms. Rask also did not give proper notice to Fresenius that she needed an accommodation; nor did she show

that being permitted to miss work on short notice was a "reasonable accommodation" that would have allowed her to perform her job. Thus Ms. Rask failed to offer sufficient evidence to support a finding that she was a "qualified individual," 42 U.S.C. § 12112(a), and the district court properly granted summary judgment to Fresenius on her ADA and MHRA claims.

II.

We turn now to Ms. Rask's FMLA claims. Under the act, an eligible employee is entitled to up to twelve weeks of unpaid leave during a twelve-month period "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(1)(D). The FMLA prohibits employers from discriminating against employees for using their FMLA leave. See Stallings v. Hussmann Corp., 447 F.3d 1041, 1051 (8th Cir.2006). Ms. Rask claims that Fresenius violated the FMLA by terminating her employment based on absences for which she should have been given FMLA leave.

The district court found that Ms. Rask failed to provide Fresenius with sufficient notice that she was taking FMLA leave. Rask, 2006 WL 3060143, at * 16. The statute does not specify what kind of notice employees are required to give of their intent to take FMLA leave when the need for leave is unforeseeable. But the relevant regulations provide some considerable guidance, and they are generous to employees. Notice must be given "as soon as practicable," but "the employee need not explicitly

assert rights under the FMLA or even mention the FMLA" to require the employer to determine whether leave would be covered by the FMLA. 29 C.F.R. § 825.303(a),(b). Instead "the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave." Browning v. Liberty Mut. Ins. Co., 178

[509 F.3d 472]

F.3d 1043, 1049 (8th Cir.1999), cert. denied, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999).

Because a serious health condition is a prerequisite for FMLA leave, an employee must provide information to the employer "to suggest that his health condition could be serious." See Woods v. DaimlerChrysler Corp., 409 F.3d 984, 990-91 (8th Cir.2005). The employer must be made aware that the absence is due to a serious illness so the employer can distinguish it from ordinary "sick-days," or even malingering, as a type of unusual and privileged absence. See id. at 991. To hold otherwise would create an unreasonable burden for employers, requiring them to investigate virtually every absence to ensure that it does not qualify for FMLA leave.

Ms. Rask's absences fall into two groups, and by her own admission the FMLA potentially covers only one of them. The first group of absences gave rise to a second written disciplinary warning to Ms. Rask. Because she has admitted that as of that time her supervisors were unaware that she had depression, she can claim no protection for these absences. The

second group of absences was noted on the final written disciplinary notice that accompanied the termination of her employment. The question thus reduces itself to whether the notice that Ms. Rask gave for the second group of absences was sufficient for her absences to be privileged. If it was, then the "but for" cause of Ms. Rask's dismissal might also have been privileged, creating a genuine issue of material fact as to whether her FMLA rights were violated. We conclude that Ms. Rask did not put Fresenius on notice that she had a serious health condition.

Under the FMLA, the "term `serious health condition' means an illness, injury, impairment, or physical or mental condition that involves — ... inpatient care ... or ... continuing treatment by a health care provider," 29 U.S.C. § 2611(11), and Ms. Rask's claim is based on continuing treatment. The relevant regulations list several categories of serious health conditions involving continuing treatment, but it appears to us that only one could possibly apply to Ms. Rask, i.e., "[a]ny period of incapacity or treatment for such incapacity due to a chronic health condition." See 29 C.F.R. § 825.114(a)(2)(iii). A "chronic health condition" is one that requires periodic visits to a health care provider, continues over an extended period of time, and may cause "episodic rather than a continuing period of incapacity," 29 C.F.R. § 825.114(a)(2)(iii), and "incapacity" — according to another subsection of the regulation — means an "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom," 29 C.F.R. § 825.114(a)(2)(i). We

therefore conclude that any mental illness or condition that continues over an extended period of time and requires periodic doctor's visits because of, or to prevent, episodes during which the employee cannot perform regular daily activities qualifies as a serious health condition.

As inclusive as this definition is, we believe nevertheless that it does not include depression in all its forms. Depression, like many mental illnesses, is a condition with many variations, and in common parlance the word is used to describe a wide variety of symptoms, including simply "a state of feeling sad," Merriam-Webster Dictionary (2007); cf. Ristrom v. Asbestos Workers Local 34, 370 F.3d 763, 769 (8th Cir.2004). There is no medical evidence in the record indicating that all forms of diagnosed depression,

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even if left untreated, would result in incapacity. We therefore think that Ms. Rask would need to apprise Fresenius of more than the mere fact that she had been diagnosed with something called "depression" to put them on notice that she had a serious health condition.

Ms. Rask draws our attention to Spangler v. Federal Home Loan Bank of Des Moines, 278 F.3d 847, 852 (8th Cir.2002), where we found that a genuine issue of material fact existed as to whether a bank employee with depression put the bank on notice that she needed FMLA leave by telling them that she would be absent for "depression again." Id.

at 852. We believe that Spangler can be distinguished from this case.

In Spangler there was a "great deal of evidence of the Bank's awareness of [Ms. Spangler's] mental condition. She informed several supervisors of her illness throughout the time that she was employed with the Bank." Id. In addition, Ms. Spangler had taken two formal leaves of absence to obtain treatment for her depression, and bank management had discussed, apparently among themselves, the fact that Ms. Spangler was absent from work for treatment of depression. Id. at 848-49. The bank was therefore aware that Ms. Spangler had a chronic condition that required treatment to deal with incapacity: In short, they knew that she had a serious health condition. When Ms. Spangler called on the day of her final absence and informed the bank that she would be gone for "depression again," this put the bank on notice that she required FMLA leave.

Ms. Rask argues that her case is like Spangler because she told her supervisor on the day before her final absence that she would be absent for "help with my medication still, I'm still having a lot of side effects from what they put me on." She maintains that this statement should have the same effect that the Spangler court gave to the employee's statement that she needed to be absent because she had "depression again." Fresenius, however, did not have the contextual knowledge that the employer in Spangler had that would link these statements with a serious health condition. The closest equivalent in this case to the leaves of absence in Spangler was an incident when Ms. Rask left work early because a

new medication allegedly made her too confused and anxious to continue working. Ms. Rask attested that at this point the best informed of her supervisors, Patty Pederson, who allegedly knew that she was "depressed," also "knew about my medication management." Ms. Rask attested that on the day when she left work she "went and told Patty that I needed to leave, I'm not feeling right, my medication, I'm having side effects from it or something." In addition, at a disciplinary meeting after the incident Ms. Rask attested, in an apparent effort to explain the incident, that she "let [her supervisors] know that I'm having problems with my medication and ... I might miss a day here and there because of it."

We conclude that there is no evidence in the record that Ms. Rask at any point gave her supervisors any details about her depression, its severity, or any incapacity that it might give rise to, sufficient to indicate that it, as opposed to the side effects from her medication, was serious. The side effects in this case are not covered by the FMLA because there was no evidence that they were a "chronic health condition." 29 C.F.R. § 825.114(a)(2)(iii). It is true that Ms. Rask attested that her other supervisor, Christine Mitchell, responded to her explanations at the disciplinary meeting by saying "Well, this is the first time I've heard about any depression

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or anything." But even if Ms. Mitchell did say that, the statement would indicate only that Fresenius knew that Ms. Rask was "depressed" with all the

ambiguity that the word entails. When Ms. Rask said that she would be absent for "help with my medication," Fresenius lacked any context to indicate that the side effects of Ms. Rask's medications were not the cause of the absence. It also lacked any context to link this absence with a serious health condition.

The evidence in this case simply cannot support a finding that Fresenius was on notice that Ms. Rask needed FMLA leave. The regulations already make it very easy for Ms. Rask to give notice of her intent to take leave. She is not required to understand when she may take FMLA leave, or to state explicitly that she intends to take FMLA leave, or, indeed, even to know that the FMLA exists. All she has to do is apprise her employer of the specifics of her health condition in a way that makes it reasonably plain that it is serious and tell her employer that this is why she will be absent. Her employer would then have the duty to investigate whether she is entitled to FMLA leave. Because Ms. Rask failed to do this, her claim must fail.

III.

Affirmed.

Notes:

1. The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Elizabeth Rask,

Plaintiff,

v.

MEMORANDUM OPINION AND ORDER
Civil No. 05-1267 ADM/RLE

Fresenius Medical Care North America,

Defendant.

Daniel E. Warner, Esq.,Warner Law Office, P.A., Inver Grove Heights, MN, on behalf of Plaintiff.

Marko J. Mrkonich, Esq. and Sandro M. Garofalo, Esq., Littler Mendelson, P.C., Minneapolis, MN, on behalf of Defendant.

I. INTRODUCTION

On August 30, 2006, oral argument before the undersigned United States District Judge was heard on Defendant Fresenius Medical Care North America's ("Defendant" or "Fresenius")Motion for Summary Judgment [Docket No. 35]. In her Complaint, [Docket No. 1], Plaintiff Elizabeth Rask

("Plaintiff" or "Rask") asserts claims of discrimination and failure to make reasonable accommodation in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112, and the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.08. Plaintiff further alleges interference with her rights under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2615(a)(1). Plaintiff has also filed an Application for Judgment by Default [Docket No. 49], alleging that Fresenius has failed to answer Plaintiff's Complaint. For the reasons set forth below, Plaintiff's Application for Judgment by Default is denied, and Defendant's Motion for Summary Judgment is granted.

II. BACKGROUND

A. Rask's Employment History

Plaintiff was hired as a patient care technician ("PCT") in the dialysis unit at Miller-Dwan Medical Center in Eveleth, Minnesota in April 1998.[1] Garofalo Aff. [Docket No. 38] Exs. B-1, B-2, B-3 (Rask Dep.) at 13-17; Warner Aff. [Docket No. 44] Ex. C-I at C4-C8. Prior to commencing employment at Miller-Dwan, Rask completed a pre-placement medical evaluation on April 8, 1998. Warner Aff. Ex. C-I at C4-C8. On the medical evaluation form, Rask noted that she suffered from depression and took

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[1] In her deposition testimony, Rask stated that she began employment at Miller-Dwan in April 1997. Based on later testimony and the dated pre-employment medical examination, the actual date of her application and employment is more likely April 1998.

Prozac to treat her condition.[2] Id. at C4-C5. Rask continued to receive treatment and take medication for her depression while employed at Miller-Dwan, and later Fresenius. Rask Dep. at 51; Warner Aff. Exs. C-I to C-II.

Rask was subsequently laid off from the Eveleth clinic because the number of patients declined; however, she occasionally worked on-call in the Miller-Dwan Duluth clinic on a "per diem" basis. Rask Dep. at 19, 30-32. In September of 2000, Fresenius acquired the Miller-Dwan dialysis units. Id. at 30, 32, 34. Plaintiff continued working in Duluth as a per diem employee until she became a regular permanent employee at the clinic on April 15, 2001. Id. at 36, 41-42, 44, 93, Ex. 3.

According to Plaintiff, on her first day of work in Eveleth in 1998, a nurse gave her an instruction in a rude manner. Id. at 24-25. Rask also stated that some of her co-workers were part of a clique from which she was excluded. Id. at 27. Rask, however, denied that this treatment was based on any discriminatory animus. Id. at 26. Rask stated that after she became a regular employee, there were "always incidences" in which she felt that she was treated unfairly, including one occasion when a co-worker told Plaintiff that she smiled too much. Id. at 53-54. Plaintiff alleges that she was unfairly assigned to work with difficult patient groups, and she

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[2] Defendant avers that Miller-Dwan never transferred this form to Fresenius, and that Fresenius saw this form for the first time during this litigation. Mitchell Suppplemental Aff. [Docket No. 55].

experienced "petty" unfair and inappropriate treatment. Id. at 57, 61. Although Rask complained about the treatment, nothing was done to address it. Id. at 57. Rask claims that the unfair treatment continued after Patricia Pederson ("Pederson"), Clinical Manager of the Duluth unit, became her supervisor in March of 2003. Id. at 64; Garofalo Aff. Ex. D-1 (Pederson Dep.) at 7, 11. This treatment included not having meetings and being given short notice regarding the work schedule, conditions that Plaintiff felt were "terrible" and "very stressful." Rask Dep. at 64. She also regarded as unfair and inappropriate the fact that the employees "worked short" without adequate coverage for shifts, were instructed to use limited amounts of supplies such as bandages and gauze, and were expected to learn to use new machines quickly. Id. at 73-74. However, Rask also acknowledged that these working conditions affected all employees in the unit and were not specifically directed at Rask. Id. at 64, 73, 75.

According to Plaintiff, after she was hired as a permanent employee in Duluth in 2001, she had fairly regular attendance. Id. at 81. She denied that there were any major life activities in which she was unable to participate, stating "I was pretty much hanging in there" and "trying hard." Id. at 82. Plaintiff stated that at that time, her medication was "pretty much working." Id. at 83. She felt all the employees were "stressed" during that time and "were trying to get through with the major corporation taking over" because of the differences in operations between Fresenius and Miller-Dwan. Id. at 82. She alleges the "stress" at work and the "fact that [Fresenius] didn't care how [the employees] felt"

and "it was all about the money . . . [and] how much Fresenius could make" caused her to be disabled. Id. at 80.

B. Defendant's Policies

Defendant's corrective action policy is outlined in the Field Services Human Resource Policy Manual and consists of progressive and cumulative disciplinary steps.[3] Garofalo Aff. Ex. C (Mitchell Dep.) Ex. 53. The FMLA policy is outlined both in the Policy Manual and the Employee Handbook. Garofalo Aff. Ex. D-2 at 25-31, 45-46. Although Rask testified that she cannot recall receiving or reading these policies, she signed an acknowledgment of receipt for the Employee Handbook and admits access to the Policy Manual. Rask Dep. at 92, 171-73, Ex. 5. Further, according to Christine Mitchell ("Mitchell"), Area Manager, all employees attend orientation and training sessions at which both policies are reviewed. Mitchell Dep. at 81.

C. Rask's Disciplinary History

Although Rask's early evaluations reflect that she performed her job well, in late 2002, she began to have performance issues. Warner Aff. Ex. D. On December 21, 2002, Kim Class, R.N., ("Class"), and

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[3] The Field Services Human Resources Policy Manual states: "The corrective action process generally consists of: verbal warning(s), written warning, including final written, suspension and/or termination...Corrective action is an ongoing process regardless of the reason for prior infractions. The process does not start over each time a different problem arises." Mitchell Dep. Ex. 53 (emphasis in original).

Amanda Caine, R.N., ("Caine") wrote statements documenting an incident involving Rask and another employee that took place on that day. Rask Dep. at 111-18, Exs. 17 at 18. According to the written accounts, Rask became angry with a co-worker, and she and the coworker "got into a yelling match on the floor" and were both "out of control." Id. Ex. 17 at BMA/Rask 0280. Plaintiff also failed to assist in patient care and complained loudly within the hearing range of patients. Id. Exs. 17-18. Rask disputed the accuracy of the statements and did not recall this incident "being that terrible." Id. at 112-13, 116.

The next day, on December 22, 2002, Caine submitted a second statement reporting that Rask was acting inappropriately toward a co-worker and made a comment about "just sticking in another needle" in a "mean" tone within earshot of a patient. Id. at 118-21, Ex. 19. Reportedly, Plaintiff was also unresponsive to urgent patient care situations that occurred during her shift. Id. at 119-20, Ex. 19. Rask denied that these events occurred. Id. at 118-19. Class documented a third incident involving Rask on May 2, 2003. Id. at 122-24, Ex. 21. According to Class, Rask was acting upset and was disrespectful toward Class. Id. at 123, Ex. 21. Rask denied the accuracy of the statement, stating that "half of it isn't true." Id. at 124.

On September 25, 2003, Rask reportedly became "very angry" and "verbally abusive to staff" upon learning that a co-worker had permission to change her schedule. Id. Ex. 23 at BMA/Rask 047. In addition, she was loud, complained to patients, and

ignored patient needs. Id. On September 27, 2003, staff members complained that it was "very difficult to work with" Rask, and that Plaintiff's anger caused a staff member to be afraid. Id. On October 1, 2003, Pederson met with Plaintiff and administered a written warning to her regarding her behavior on September 25 and 27. Id. at 128-29, Ex. 23. Specifically, the warning states that Rask ignored patient needs, refused to help staff when necessary, exploded over small things, used foul language, and was mean. Id. Ex. 23 at BMA/Rask 047. Pederson advised Rask to treat all patients and staff in a respectful manner, refrain from using inappropriate language, express her anger in an appropriate manner and not in the presence of patients, and respond immediately to patient needs. Id. Rask declined to sign the corrective action form and requested a mediated session to discuss the issues in the written warning. Id. Ex. 23 at BMA/Rask 048.

Plaintiff did not mention her mental health issues during the requested mediation session, which was attended by Rask, Pederson, Mitchell, and the co-worker with whom Plaintiff was angry. Id. at 131. Rask stated that during this meeting she "did not say [she had] mental health problems," and "never explained it that way," rather, only stated that she was "on medication." Id. at 132. Rask acknowledged that as of October 1, 2003, she had not personally told the coworker, Pederson, or Mitchell that she had mental health issues that required medication. Id. at 133. Rask, however, claimed that they were aware of her condition through "hearsay." Id. at 132.

On October 24, 2003, Rask received a final written warning as a result of her unscheduled absences. Id. at 133-34; Pederson Dep. at 72. Plaintiff acknowledged that she understood that it was important for her to improve her attendance, as absences put a burden on her co-workers. Rask Dep. at 135. According to Pederson, during this warning she discussed Rask's absenteeism with her and "asked if there was anything that we could do for her, was there anything wrong." Pederson Dep. at 73. Rask did not offer any explanation as to why she was absent, other than that she was sick. Id. Pederson did not ask Rask for a doctor's note at this time and stated that she had never asked for doctors' notes from any employees in the past. Id. at 73-74.

On March 1, 2004, Rask was upset about being scheduled to work in Eveleth and called Pederson at home to discuss it with her. Rask Dep. at 137, 140. Plaintiff placed the call from an open area at work, and the conversation was overheard by three staff members and four patients. Id. at 140, Ex. 26. Staff reported feeling "very uncomfortable" with Rask's anger and felt intimidated and embarrassed that the incident occurred at work and in the presence of patients. Id. Ex. 26. Rask acknowledged that the Duluth unit was overstaffed, and "everybody was supposed to go" to Eveleth to fill in on occasion. Id. at 137. According to Rask, she explained to Pederson that she did not want to work in Eveleth because on her first day there, six years earlier, a nurse was rude to her, and Plaintiff "doubted" whether things had changed since that time. Id. at 148. During the conversation, Rask was loud, crying, and disrespectful toward Pederson and ignored requests

to discuss the matter at work the following day. Id. Ex. 26. Rask told Pederson that she felt that she did not receive any respect "especially from her," and told Pederson that "she ha[d] no heart." Id. at 137-38, 146.

As a result of the March 1 incident, Rask was suspended on March 5, 2004. Id. at Ex. 26. At that time, Rask was advised that she must abide by the expectations for employee conduct set forth in the Human Resource Policy Manual, and that ongoing negative remarks about her supervisor, the company, her unit and her co-workers would not be tolerated. Id. Ex. 26 at BMA/Rask 054. She was also notified that failure to meet expectations for change would result in further corrective action, and possibly termination. Id. Rask did not discuss her medication or mental health during her telephone conversation with Pederson on March 1, 2004, or during the explanation of the corrective action and suspension on March 5, 2004. Id. at 148-49.

According to Rask, on March 22, 2004, she began taking a new medication and had been at work for an hour when she started feeling anxious, could not think clearly, and was "not really [her]self." Id. at 153. Rask claimed that her "mind was boggled," she "couldn't concentrate," had racing thoughts, and felt that she "couldn't do this [work] today." Id. at 65-66. Rask stated that she told Pederson that she was "not feeling right" and was "having side effects" from her medication. Id. at 66, 153. Pederson asked Rask if she would like to lie down, but Plaintiff stated that she wanted to go home, and subsequently left work. Id. Plaintiff understood that her early departure

constituted a violation of the attendance policy. Id. at 155.

After this incident, Mitchell and Pederson met with Plaintiff to discuss her absence. Id. at 66; Mitchell Dep. at 72-74. According to Rask, she explained why she left and Mitchell said, "this is the first time I've heard about any depression or anything." Rask Dep. at 66. Plaintiff also claimed that she told Pederson and Mitchell that she was "having problems with [her] medication." Id. Mitchell denied knowledge that Rask was suffering from depression, and claimed that Plaintiff stated only that "I'm sure that you've heard that I'm on medication and everybody on the floor is talking about it." Mitchell Dep. at 71. Mitchell has testified she had not "heard" that Rask was on medication, and Plaintiff did not elaborate further on her remark. Id. at 71-72, 74. Mitchell claimed that during this meeting she asked Rask "[i]s there anything else that would be important for us to know . . . about this?" Id. at 72. Plaintiff allegedly responded that she did not like working for Defendant, it was a "terrible" place to work, she felt underappreciated, and people did not like her. Id. Plaintiff claimed that in addition to Pederson and Mitchell, "everybody in Eveleth knew [she] took Prozac" and "whenever anything happened at that unit, no matter if it was supposed to be private or not, everybody knew about it." Rask Dep. at 80. Plaintiff claimed that she told a co-worker, Paula, about her depression and asserted that another co-worker, Jessica, knew "probably because [Rask] was crying all the time at work." Id. at 81.

On May 10, 2004, Rask was absent from work because she was seeing her doctor about medication for her depression. Id. at 155. On May 28, 2004, Rask was scheduled to work at the Eveleth clinic. Id. at 156-57, Ex. 30. Rask stated that she was not happy about being scheduled to work in Eveleth, and she did not want to work there because of the way that she had been treated previously. Id. at 69-70. According to Plaintiff, on May 27, 2004, she was instructed by her doctor that she needed to have her medication adjusted and should not go in to work. Id. at 66-67, 70, 156, 158. Rask stated that she called Pederson and told her that she would not be able to work the following day (May 28) because she "need[ed] help with [her] medication" and she was "having a lot of side effects from what they put [her] on." Id. at 156, 158.[4] During this time period, Plaintiff was working only two days per week. She could not recall why she did not go to the doctor on a day that she was not scheduled to work.[5] Id. at 160-61.

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[4] Pederson has testified that Rask did not call her, but called someone in Eveleth directly and told that person that she would be absent from work. Pederson Dep. at 67. Pederson claimed that she did not learn about the absence until a co-worker told her about it. Id. at 68.

[5] Rask's hours were adjusted at least four times at her request during her employment. Rask Dep. at 97-98, 102, 108, 136, 151. Rask testified that in general, an employee could reduce his or her schedule at any time and "it was up to the person what they wanted to work." Id. at 98. Rask did not indicate that any request for a reduction in hours was related to her mental or physical health. Id. at 97, 99. Apparently, the only time that Rask's request for a change in hours was not accommodated was during a period when all available personnel

Pederson stated that she did not try to find out why Rask was absent on May 28, because she and Rask "had talked about her absences" previously during corrective action meetings, and Plaintiff "didn't give [Pederson] any reasons for her many absences." Pederson Dep. at 72. Plaintiff did not specifically mention that her medication was for depression in this conversation, however she claims Pederson "knew it was for [her] depression." Rask Dep. at 158. Although Plaintiff did not provide specific instances of conversations, she asserted that she discussed her depression with Pederson "at times, on the phone, in person." Id. at 159. Pederson denied that Rask ever discussed with her having anxiety or depression. Pederson Dep. at 88-89. According to Pederson, on one occasion a few months prior to Rask's termination, Rask told her "over the telephone that she was going to see her doctor to get her medicine regulated," however Plaintiff did not state what her medication was for. Id. at 87-88.

Further, Rask did not submit doctor's notes for any of her absences resulting in corrective action. Rask Dep. at 155. She never provided documentation of her depression or treatment to Pederson or anyone else at Fresenius until after her employment was terminated. Id. at 79, 159. In addition, Rask never discussed or requested FMLA leave, according to Plaintiff, because her "doctor preferred that [she] tried to stay working." Id. at 79, 155, 176.

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were needed to assist in the operation of a new unit. Id. at 72, 124-125.

Pederson testified that, "the ongoing repeated absences, along with . . . the corrective action process" led to Rask's termination. Pederson Dep. at 81. She further stated that the termination was not based on one incident, rather, it was "a culmination of counseling sessions and corrective action sessions that we had had with [Rask]." Id. According to Mitchell, the absences constituted an additional policy violation, in a progressive and cumulative discipline program. Mitchell Dep. at 57. Rask had not offered Mitchell any explanation for her absences or early departure, and therefore Mitchell and Pederson decided to discharge Rask. Id. at 60.

Rask was terminated on June 2, 2004. Id. at 89; Rask Dep. at 152. The termination notice states that Rask violated Defendant's Attendance and Tardiness Policy, specifically that she left ill one hour into her shift on March 22, and was absent on May 10 and May 28, 2004. Rask Dep. Ex. 29. The document further states that the "[e]xpected changes from previous counseling and written Corrective Action Statements have not been fulfilled by [Rask]." Id. at 164-65, Ex. 29.

On or about June 14, 2004, Mitchell received a fax from Eric Lehto, the Organizing Director of the AFSCME union, transmitting a copy of a letter from Range Mental Health Center. Mitchell Dep. at 88, Ex. 51. The letter was drafted by Katherine Cohen, D.O., Plaintiff's psychiatrist, on June 4, 2004, two days after Rask's termination. Id. In the letter, Dr. Cohen stated that Rask was being treated at the clinic for major depression. Id. Mitchell asserted that none of the information discussed in the letter was

disclosed to Defendant during Plaintiff's employment. Mitchell Dep. at 90.

After her termination, Rask was unemployed until August of 2005. Rask Dep. at 8-9, 89. Rask alleges that during this time she could not function and was not well enough to look for work consistently. Id. at 89. On or about March 11, 2005, Rask filed a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). Id. at 76. In her charge, she indicated that she was discriminated against based on her disability, and reported that the discrimination took place between March 22, 2004, and June 2, 2004. Id. at 77-78. She subsequently received a right to sue notice from the EEOC and the Minnesota Department of Human Rights. Compl. at 3.

III. DISCUSSION

A. Standard of Review

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall issue "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party.

Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir. 1995). The nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995).

B. Defendant's Standing and Plaintiff's Application for Default Judgment

In her Complaint, Plaintiff named Fresenius Medical Care North America as the Defendant. In its Answer, Defendant identifies itself as "Defendant Bio-Medical Applications of Minnesota, Inc., d/b/a FMC Dialysis Services Duluth (erroneously identified herein as 'Fresenius Medical Care North America')." Def.'s Answer at 1 [Docket No. 2].[6] Plaintiff avers that because Bio-Medical Applications of Minnesota, Inc. ("BMA") is not a party to the lawsuit, it cannot properly bring the summary judgment Motion presently before the Court. Further, Plaintiff argues that because BMA, not Fresenius, responded to the Complaint and has assumed the defense of the action, Fresenius has failed to timely answer the Summons and Complaint, and a judgment by default should be entered against Fresenius.

"Default judgment for failure to defend is appropriate when the party's conduct includes 'willful violations of court rules, contumacious conduct, or intentional delays.'" Ackra Direct Mktg. Corp. v.

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[6] In this Order, Defendant will be referred to as "Fresenius," and not "BMA" to ensure consistency throughout the record

Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996) (citing United States v. Harre, 983 F.2d 128, 130 (8th Cir. 1993)). "The Federal Rules of Civil Procedure commit the entry of a default judgment against a party to the sound discretion of the trial court." FTC v. Packers Brand Meats, Inc., 562 F.2d 9, 10 (8th Cir. 1977) (citations omitted). There is a "strong judicial policy against default judgments" and a "judicial preference for adjudication on the merits." Oberstar v. FDIC, 987 F.2d 494, 504 (8th Cir. 1993).

Both parties have submitted conflicting documents purporting to establish that Plaintiff's employer was either Fresenius or BMA. Plaintiff asserts that BMA is a separate legal entity from Fresenius because BMA is a Delaware corporation, while Fresenius is headquartered in Massachusetts, and is a wholly-owned subsidiary of Fresenius Medical Care AG & Co. KgaA, located in Germany. Warner Aff. Ex. A at 1-2. Plaintiff's retention bonus agreement names Fresenius as the employer, and Fresenius's Employee Handbook extends a welcome to new employees of Fresenius. Warner Aff. Ex. A at 4; Warner Supplemental Aff. [Docket No. 60] Ex. O. Defendant avers that BMA is actually Rask's employer and provides W-2 earning statements naming BMA as Plaintiff's employer. Mitchell Supplemental Aff. Ex. A.

Plaintiff argues that the proper employer must be determined because of the difference in size between the entities. If the Defendant has more than 500 employees, the amount of compensatory damages is enhanced under 42 U.S.C. § 1981a(b)(3), based upon the number of employees of the respondent.

BMA employs approximately 293 employees, while Fresenius is in another category with over 500 employees. Warner Supplemental Aff. Exs. N, L.

Which employer category Defendant fits in for the purpose of damage calculation under 42 U.S.C. § 1981a(b)(3) is an issue without consequence here. Plaintiff has not established a case of liability to proceed beyond summary judgment, and the issue of the number of employees of Defendant for damage calculation is not reached.

Further, Fresenius has not "failed to plead or otherwise defend" against Plaintiff's Complaint. Likewise, there has been no showing that Fresenius's conduct has been contumacious or that it has willfully violated court rules. BMA submitted a timely Answer to Plaintiff's Complaint, and admitted in the Answer that it was the proper defendant in this litigation, not Fresenius. In addition, this case has been actively litigated by both parties since the filing of the Complaint on June 28, 2005. As such, a default judgment against Defendant is not appropriate, and Plaintiff's Application for Judgment by Default is denied.

C. Incomplete Discovery

Plaintiff also objects to Defendant's Motion for Summary Judgment on the grounds that at the time of the hearing on the motion, discovery ordered by Chief Magistrate Judge Raymond L. Erickson [Docket No. 42] remained outstanding. Pl.'s Mem. Opp'n [Docket No. 43] at 6. Since the hearing, Plaintiff filed a supplemental memorandum in

opposition to Defendant's Motion for Summary Judgment [Docket No. 59] based upon the additional discovery received by Plaintiff on August 30, and September 1, 2006. Plaintiff contends that still further discovery is necessary to demonstrate the existence of a genuine issue of material fact before the Court rules on the instant motion.

As the Eighth Circuit has noted, "[a]lthough a district court is required to give the parties ample time to conduct discovery, Rule 56(c) does not require the completion of all discovery before a court may enter summary judgment." Roark v. City of Hazen, 189 F.3d 758, 762 (8th Cir. 1999) (citing Dulany v. Carnahan, 132 F.3d 1234, 1238 (8th Cir. 1997)). "Rule 56(f) allows a party to request a delay in granting summary judgment if the party can make a good faith showing that postponement of the ruling would enable it to discover additional evidence which might rebut the movant's showing of the absence of a genuine issue of material fact." Robinson v. Terex Corp., 439 F.3d 465, 467 (8th Cir. 2006) (citing Fed R. Civ. P. 56(f); Small Bus. Admin. v. Light, 766 F.2d 394, 397-98 (8th Cir. 1985)).

Plaintiff's Supplemental Memorandum argues that additional discovery is needed concerning primarily the issues of the status of BMA and Fresenius as the appropriate corporate defendant. Plaintiff requests information about the corporate structure and size of BMA and Fresenius primarily for the purpose of determining limitations on damages under 42 U.S.C. § 1981a(b)(3). Again, this issue is relevant only if Plaintiff could establish a

prima facie case of liability which has not been accomplished.

The Plaintiff also avers that the names and contact information of Plaintiff's former coworkers are necessary to obtain evidence regarding the co-workers' observations of Plaintiff in the workplace and their knowledge of Defendant's awareness of Plaintiff's disability. According to Plaintiff's own testimony, she only told one co-worker, Paula, specifically that she suffered from depression. Rask Dep. at 81. Plaintiff's further statement that one other co-worker, Jessica, "probably" knew about her depression because Rask was crying at work is not sufficient to establish that Plaintiff's former co-workers are likely to have knowledge of her depression. Id. Further, there has been no showing that the management at Fresenius had any knowledge of Rask's depression. Although Plaintiff insists that she told Pederson about her condition, Plaintiff could not recall specific conversations regarding depression, and only remembers vague, general statements to both Pederson and Mitchell about her medication and "not feeling right." Id. at 153. The discovery of the principal participants is complete and the testimony of tangentially involved co-workers is unlikely to create a genuine issue of fact.

Further, the time period for discovery as established in the Pretrial Order [Docket No. 9] terminated on June 1, 2006. Plaintiff has not made a showing that discovery has been inadequate or that there is good cause to allow discovery beyond the time period allowed.

D. ADA

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a).[7] A "qualified individual with a disability" is a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). To establish a prima facie case of discrimination under the ADA, Plaintiff must show that: (1) she is disabled within the meaning of the ADA, (2) she is qualified to perform the essential functions of her job with or without reasonable accommodation, and (3) she suffered an adverse employment action under circumstances that give rise to an inference of unlawful discrimination based on disability. Dropinski v. Douglas County, 298 F.3d 704, 706 (8th Cir. 2002).

1. Disability

The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[8] 42 U.S.C.

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[7] The MHRA parallels the ADA. Therefore, the state and federal claims are analyzed together. Longen v. Waterous Co., 347 F.3d 685, 688 n.2 (8th Cir. 2003).

[8] In her Memorandum in Opposition to Defendant's Motion for Summary Judgment, Plaintiff offers arguments only with respect to the first theory of disability, for this reason, the remaining two theories of disability are not addressed here.

§§ 12102(2)(A)-(C). The determination of whether a person has a disability under the ADA is an individualized inquiry and is made with consideration to the mitigating measures employed by that person, such as the use of medication. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-83 (1999). Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Several factors may be considered to determine "whether a person is substantially limited in a major life activity: (1) the nature and severity of the impairment; (2) its duration or anticipated duration; and (3) its long-term impact." Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 679 (8th Cir. 2001) (citing 29 C.F.R. §§ 1630.2(j)(2)(i)-(iii)). A major life activity is substantially limited if an individual is unable to "perform a basic function that the average person in the general population can perform" or is significantly restricted in "the condition, manner, or duration under which [she] can perform a particular major life activity as compared to an average person in the general population." Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1206 (8th Cir. 1997); see 29 C.F.R. § 1630.2(j)(1).

Plaintiff must present evidence from which a reasonable inference can be drawn that a major life activity is substantially limited. Snow, 128 F.3d at 1207. "'[S]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'" Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 196 (2002). The ADA's terms are "interpreted

strictly to create a demanding standard for qualifying as disabled . . . ." Id. at 197. Plaintiff must present evidence that she is prevented or severely restricted "from doing activities that are of central importance to most people's daily lives." Id. at 198. Further, to be substantially limiting, the "impairment's impact must also be permanent or long-term." Id.

Plaintiff alleges that she is substantially limited in the major life activities of thinking, concentrating, sleeping, and working. Pl. Mem. Opp'n at 29. "The 'ability to perform cognitive functions on the level of an average person' constitutes a major life activity." Battle v. United Parcel Serv., Inc., 438 F.3d 856, 861 (8th Cir. 2006) (citing Brown v. Lester E. Cox Med. Ctrs., 286 F.3d 1040, 1045 (8th Cir. 2002); Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999)). "Accordingly, thinking and concentrating qualify as 'major life activities' under the ADA." Id. (citations omitted). However, an individual's "conclusory statements" that she has difficulty concentrating, coupled with an individual's own testimony that she could perform her job, does not suffice to establish that her condition significantly restricted her ability to concentrate as compared to the general population. Heisler v. Metro. Council, 339 F.3d 622, 629 (8th Cir. 2003).

Plaintiff has failed to produce evidence to show that she is substantially limited in her ability to think and concentrate. Despite her conclusory statements that she is so limited, the record does not support her contentions. In her deposition testimony, she denied that there were any major life activities in which she was substantially limited during her

employment with Defendant. Rask Dep. at 81-83. Further, she has testified that she did not read the corrective action policy as it was not necessary because she performed her job well. Id. at 174. A single incident, on March 22, 2004, when Plaintiff was unable to concentrate or think clearly at work does not give rise to an inference that she was substantially limited in a major life activity. Id. at 65-66, 152-53.

Affidavits submitted by Rask's friends and family do not change the analysis. Rask's husband stated that he observed her significant problems with thinking clearly and concentrating. Robert Rask Aff. [Docket No. 46] at 1. Monica Jeanette, Plaintiff's son's fianceé, attested that Rask was having trouble focusing on anything but her depression in the last months of her employment with Defendant. Jeanette Aff. [Docket No. 48] at 1-2. Eric Lehto stated that during his conversations with Rask before her employment was terminated, she "had difficulty focusing on what [he] was saying" and had a hard time grasping what he was telling her. Lehto Aff. [Docket No. 47] at 1-2. Both Jeanette and Lehto testified that their observations of her difficulty concentrating occurred within a limited period, specifically the few months prior to her termination. This limited duration does not suffice to show that Plaintiff's condition had a significant, long-term impact on her cognitive function. In addition, the affidavits are not sufficient to controvert Plaintiff's own testimony that she was "hanging in there" and her activities were not limited by her depression. Rask Dep. at 82.

Plaintiff's medical records also do not demonstrate that her abilities to think and concentrate are substantially limited on a permanent or long-term basis. The records from December of 1997 through April of 2003 do not mention her difficulty with thinking or concentration. Warner Aff. Exs. C-I at C1-C8, C10; C-II at 1-2. On March 9, 2004, her medical record notes that Plaintiff's insight was slightly impaired, however her memory and orientation were normal. Warner Aff. Ex. C-II at 3. On April 23, 2004, her record reflects that she had problems with memory, concentration, and racing thoughts, however she was fully oriented and showed no indication of disturbance of thought processes. Id. at 4-5. According to her records, on May 5, 2004, Plaintiff was "thinking in circles," and on May 14, 2004, she was unable to think clearly. Id. at 9-10. Her records from November 11, 2004, January 28, 2005, and January 25, 2006 all indicate that there is "no depression" and make no mention of her ability to think or concentrate. Rask Dep. Exs. 34-36. The totality of her medical records demonstrates that Plaintiff's ability to think and concentrate on a long-term basis as compared to the general population is not significantly limited.

"'Sleeping' is also recognized by some courts as a 'major life activity.'" Nuzum v. Ozark Auto. Distribs., Inc., 432 F.3d 839, 846 (8th Cir. 2005) (citing Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998) (sleep is "undoubtedly a major life activity"); Swanson v. Univ. of Cincinnati, 268 F.3d 307, 315 (6th Cir. 2001); Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir.1999); see also Heisler, 339 F.3d at 628 (8th Cir. 2003) (assuming

sleep is major life activity)). Assuming that sleeping is a major life activity, to demonstrate a substantial limitation, an individual "must show that his sleeping patterns are significantly different from the rest of the population's." Nuzum 432 F.3d at 848 (holding that the plaintiff, who only slept two and a half hours at a time, for a total of four to five hours of sleep per night, had not shown that his sleeping patterns were significantly different from the rest of the population's); see also Heisler, 339 F.3d at 628 (plaintiff failed to establish that her depression significantly restricted her ability to sleep as compared to the general population where the record did not reveal the severity of sleep apnea or whether medication improved her sleep); Pack v. Kmart Corp., 166 F.3d at 1306 (holding that although plaintiff testified that she often got only two or three hours of sleep a night and there was evidence that plaintiff had episodes of sleep disruption, there was "no indication that her sleep problems were severe, long term, or had a permanent impact").

Rask has not demonstrated a substantial, long-term limitation on her ability to sleep. Rask's medical records indicate that her inability to sleep was sporadic, rather than a severe and permanent limitation. Of the medical records in evidence that discuss Plaintiff's ability to sleep, five indicate that she reported difficulty sleeping or insomnia; two mention that she "sometimes" had difficulty with sleep; two indicate that she was sleeping abnormal hours (one notes her hours of sleep were from 6:00 a.m. to 3:00 p.m., suggesting that she slept for nine hours); four indicate that she was sleeping "better" or "OK;" and two report that she was sleeping for at least eight hours. Warner Aff. Exs. C-I to C-II; Rask

Dep. Exs. 34-36. Although Rask's husband indicates that he observed Rask having "significant problems . . . sleeping at night," his assertion does not rise to the level of sufficient evidence to show that Plaintiff's ability to sleep was significantly restricted by her depression as compared to the general population. Robert Rask Aff. at 1.

Finally, Plaintiff asserts that she is substantially limited in the major life activity of working. To be regarded as substantially limited in the major life activity of working, an individual must demonstrate that she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i); see Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 949 (8th Cir. 1999). Further, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523 (1999) ("[T]o be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job."); Miller v. City of Springfield, 146 F.3d 612, 615 (8th Cir. 1998) (holding that a limitation on a single, particular job cannot constitute a substantial limitation of the major life activity of working under the ADA).

Plaintiff has failed to demonstrate that because of her depression she has suffered a significant reduction in meaningful employment

opportunities. See Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996). In August 2005, Plaintiff began employment at a residential care center providing care to individuals with special needs, and is currently working forty hours per week cleaning the facility. Rask Dep. at 8-9. Although Plaintiff claims that she was unemployed for over a year after her termination by Defendant because she could not function, and was not well enough to look for work consistently, her medical records from this period state that she had "no depression." Id. at 89, Exs. 34-36.

Rask testified repeatedly that she disapproved of several of Defendant's management and operational policies, and stated that the exercise of those policies caused her to be disabled. Rask Dep. at 80. She stated repeatedly that she found the work to be stressful, and her medical records also note the stressful nature of her job. Despite these assertions, and the possibility that being a patient care technician for Defendant may not have been the most suitable employment environment for Rask, Plaintiff has failed to show that she would be precluded from working at a broad range of jobs in various classes because of her condition. Plaintiff's impairment does not substantially limit a major life activity sufficient to constitute a disability within the ADA definition.

2. Qualified to Perform the Essential Functions

Even assuming Plaintiff is "disabled" within the meaning of the ADA, she must additionally demonstrate that she is "qualified" under the ADA

and is able to "perform the essential functions of the employment position" with or without reasonable accommodation. 42 U.S.C. § 12111(8). "An essential function may be established by evidence that includes: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; and (5) the current work experience of incumbents in similar jobs." Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 787 (8th Cir. 1998). An employer's identification of a position's essential functions is given some deference under the ADA. Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445 (8th Cir. 1998) (citing 42 U.S.C. § 12111(8)) ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential.").

Further,"[t]o be a 'qualified individual' entitled to ADA protection, 'a plaintiff must show that [her] work performance met the employer's legitimate job expectations,' with or without reasonable accommodation." Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1217 (8th Cir. 1999) (citing Wilking v. County of Ramsey, 153 F.3d 869, 873 (8th Cir. 1998)) (alteration in original). The Eighth Circuit "has repeatedly held that 'regular and reliable attendance is a necessary element of most jobs.'" Spangler v. Fed. Home Loan Bank, 278 F.3d 847, 850 (8th Cir. 2002) (citing Pickens v. Soo Line R.R. Co., 264 F.3d 773, 777 (8th Cir. 2001); Greer v. Emerson Elec. Co., 185 F.3d 917, 921 (8th Cir. 1999); Nesser,

160 F.3d at 445). "[A]n employee who is unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones." Spangler, 278 F.3d at 850 (citing Pickens, 264 F.3d at 777; Moore v. Payless Shoe Source, Inc., 187 F.3d 845, 848 (8th Cir. 1999)) (alteration in original).

Plaintiff's job description states that she is responsible for carrying out all company policies, as well as for the safe and effective delivery of patient care. Rask Dep. Ex. 11. Plaintiff failed to perform these essential functions by her repeated misbehavior. She was "verbally abusive to staff" and disrespectful toward her supervisors. Id. Exs. 21, 23, 26. Plaintiff's co-workers complained that she was difficult to work with and she frightened one staff member. Id. Ex. 23. On more than one occasion, she complained loudly and acted inappropriately in the presence of patients. Id. at 140, Exs. 19, 18, 23. In addition, Rask repeatedly failed to assist in patient care. Id. Exs. 17 at BMA/Rask 0282, 19, 23. Through the corrective action process, she was placed on notice that she was not meeting performance expectations, yet she failed to correct her behavior. Further, the nature of Plaintiff's job required that she be responsive to the medical needs of patients receiving dialysis. If Plaintiff is found to be disabled and limited in the major life activities of thinking, concentrating, and working, she is not qualified to perform the medical procedures that are the essential functions of her job.

Further, Plaintiff was notified, through the corrective action process, that Defendant considered

attendance to be an essential element of her job. See Nesser, 160 F.3d at 445 (plaintiff was placed on notice that his employer considered attendance to be an "essential element" of his job after a series of written attendance warnings). In her deposition, Rask acknowledged the importance of attendance, agreeing that absences put a burden on the nursing staff. Rask Dep. at 135. Nonetheless, on the date of her final unscheduled absence, she went to the doctor on one of only two days during the week that she was scheduled to work. Despite her prior warnings, Plaintiff continued to accumulate unscheduled absences and offered no explanation or doctor's note to notify her employer of her condition or need for time off. Defendant was unable to accommodate her absences because it had no knowledge of Plaintiff's depression. As such, Rask has failed to demonstrate that she was qualified to perform the essential functions of her position.

3. Legitimate, Nondiscriminatory Reason for Plaintiff's Termination

The burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), is used to evaluate claims under the ADA. Burchett v. Target Corp., 340 F.3d 510, 516 (8th Cir. 2003) (citing Wilking, 153 F.3d at 872). Assuming Plaintiff establishes her prima facie case, the burden then shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its actions. McDonnell Douglas, 411 U.S. at 802. Defendant has presented such a legitimate reason for terminating Rask, specifically that Rask had reached the final step in its cumulative corrective action policy, and

subsequently was absent in violation of the attendance policy. Because Defendant has articulated a legitimate, nondiscriminatory reason for the adverse employment action, the burden shifts back to Plaintiff to demonstrate that the proffered reason is a pretext for unlawful disability discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993). The ultimate burden of proving unlawful discrimination remains on Plaintiff. Id. at 507.

As an initial matter, Plaintiff fails to establish the prima facie case because there is insufficient evidence from which to reasonably infer unlawful discrimination under the facts of this case. The record reflects Plaintiff was terminated after progressive and cumulative disciplinary warnings, as well as notice from Pederson and Mitchell that further policy violations could result in Rask's dismissal. Despite these warnings, Plaintiff did nothing to make Defendant aware of her depression or her possible need for time off. While Plaintiff claims that she told Pederson and Mitchell of her depression, the evidence in the record suggests that she only told them that she was "on medication," without giving any indication as to why she was medicated. However, even assuming that Plaintiff did tell Pederson and Mitchell of her depression, she still can not establish the prima facie case, or that Defendant's legitimate, nondiscriminatory reason for her termination was mere pretext.

Although Plaintiff repeatedly relates the sole reason for her termination was her three unscheduled absences from work, this contention is not supported by the record. The termination notice,

in addition to listing Plaintiff's unscheduled absences, states that she had not made the changes required by previous counseling and corrective action and that these events placed her at the final step in the corrective action process: termination. Rask Dep. Ex. 29. Plaintiff has failed to present evidence creating a genuine factual dispute that her termination in accordance with Defendant's cumulative corrective action policy was a pretext for unlawful discrimination based on disability.

4. Failure to Accommodate Claims

"Under the ADA, an employer is required to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the requisite accommodation would impose an undue hardship on the employer's business." Battle v. United Parcel Serv., Inc., 438 F.3d 856, 862 (8th Cir. 2006) (citing 42 U.S.C. § 12112(b)(5)(A)) (emphasis added). "Before an employer must make accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists. The Interpretative Guidance on Title I of the ADA states that 'an employer [is not] expected to accommodate disabilities of which it is unaware.'" Miller v. Nat'l Cas. Co., 61 F.3d 627, 629 (8th Cir. 1995) (citing 29 C.F.R. app. § 1630.9) (alteration in original). "In general, 'it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.'" Wallin v. Minn. Dep't of Corr., 153 F.3d 681, 689 (8th Cir. 1998) (citing 29 C.F.R. app. § 1630.9). "Where the disability, resulting

limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations." Wallin, 153 F.3d at 689 (citing Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996)) (alteration in original); see also Russell v. TG Mo. Corp., 340 F.3d 735, 742 (8th Cir. 2003) (holding that it could not be reasonably inferred that the employer failed to accommodate the disability of the plaintiff when the plaintiff only stated that she "was not feeling well" when she needed to leave work and did not reference her bipolar disorder or mental condition at that time).

Plaintiff correctly cites Cravens v. Blue Cross & Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000), for the proposition that "the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith." 214 F.3d at 1021 (citing Fjellestad, 188 F.3d at 952). However, Cravens also states that to establish that an employer failed to participate in an interactive process, one must first show that the employer knew about the employee's disability. 214 F.3d at 1021. Here, the record overwhelmingly reflects that Rask has failed to notify Defendant of her depression or her need for a reasonable accommodation. She admittedly never submitted any written documentation about her depression, treatment, or medication to her employer

until after she was terminated. Although she argues that Pederson and Mitchell knew of her depression, Plaintiff fails to provide any specific accounts of conversations with Pederson, Mitchell, or any other Fresenius employee regarding her depression. Instead, her vague comments about "medication," and "not feeling right," and her absences from work because she was "sick" are not sufficient notice of her depression or need for an accommodation. Rask Dep. at 66, 132, 158; Pederson Dep. at 87-88. Despite the many conversations that Rask had with Pederson and Mitchell about her attendance and performance, Plaintiff did not mention that she was suffering from depression, nor did she request any type of accommodation. Her "failure to accommodate claims" must be denied.

E. FMLA

The FMLA allows eligible employees a total of twelve weeks of leave during any twelve month period for a variety of reasons, including "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). 29 U.S.C. § 2615(a)(1) makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the FMLA. The regulation interpreting this provision provides, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions . . . ." 29 C.F.R. § 825.220(c). However, "[a] claim under the FMLA cannot succeed unless the plaintiff can show that he gave his employer adequate and timely

notice of his need for leave . . . ." Woods v. DaimlerChrysler Corp., 409 F.3d 984, 991 (8th Cir. 2005) (citing Carter v. Ford Motor Co., 121 F.3d 1146, 1148 (8th Cir. 1997)). "In order to benefit from the protections of the statute, an employee must provide his employer with enough information to show that he may need FMLA leave." Id. at 990 (citing Thorson v. Gemini, Inc., 205 F.3d 370, 381 (8th Cir. 2000)). "Although the employee need not name the statute, he must provide information to suggest that his health condition could be serious." Id. (citing Collins v. NTN-Bower Corp., 272 F.3d 1006, 1007-09 (7th Cir. 2001)) (holding that summary judgment for the employer was proper when an employee with a "spotty attendance record" was discharged after being absent for two days and calling in "sick," as her call was inadequate notice because it offered no information to suggest that she was suffering from a serious health condition) (internal citation omitted). "Employees thus have an 'affirmative duty to indicate both the need and the reason for the leave,' and must let employers know when they anticipate returning to their position." Id. at 990-91 (citing Sanders v. May Dep't Stores Co., 315 F.3d 940, 944 (8th Cir. 2003); 29 C.F.R. § 825.302(c)).

Plaintiff claims that Defendant interfered with her right to leave under the FMLA. Although Plaintiff had access to information about Defendant's FMLA policy through various channels, she admittedly never sought FMLA leave and did not give Defendant any documentation regarding any potential FMLA qualifying absences. Throughout the corrective action process, Rask was informed that her absences were a policy violation and threatened her

performance and her employment. She had many opportunities to inquire about the FMLA or give her employer enough information to suggest that she may require FMLA leave. Further, Rask's statement that she did not pursue FMLA leave because her doctor preferred that she stay working suggests that she may have considered FMLA leave, but dismissed it as an option. Rask Dep. at 155. Rask's vague comments about her medication and calling-in "sick" were insufficient to notify Defendant that Plaintiff potentially had a serious health condition. As such, Plaintiff has failed to demonstrate that her employer had knowledge or notice of her condition, thus, she cannot show that Defendant interfered with her rights under FMLA.

IV. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant Fresenius Medical Care North America's Motion for Summary Judgment [Docket No. 35] is **GRANTED**; and

2. Plaintiff Elizabeth Rask's Application for Judgment by Default [Docket No. 49] is **DENIED**.

LET JUDGMENT BE ENTERED ACCORDINGLY. BY THE COURT:

s/Ann D. Montgomery

ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: October 26, 2006.

APPENDIX C

ORDER DENYING REHEARING
UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Elizabeth Rask,

Appellant

v.

Fresenius Medical Care North America,

Appellee

Appeal from U.S. District Court for the District of Minnesota – Minneapolis

(0:05-cv-01267-ADM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 18, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/Michael E. Gans

APPENDIX D

RELEVANT ADA STATUTES AND REGULATIONS

42 U.S.C. § 12112(b)(5)(A)

STATUTORY PROVISION IN ADA ON REASONABLE ACCOMMODATION

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--

* * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose

an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

EEOC INTERPRETATIVE GUIDANCE TO TITLE I OF THE ADA

Appendix to 29 C.F.R. Part 1630(o)

Part 1630 lists the examples, specified in title I of the ADA, of the most common types of accommodation that an employer or other covered entity may be required to provide. There are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces.

EEOC ENFORCEMENT GUIDANCE ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT

2002 WL 31994335 * 3

> When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.' Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.

EEOC REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

29 C.F.R. § 1630.2(o)

Definition of Reasonable Accommodation

> (o) Reasonable accommodation.

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment

to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

EEOC REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

29 C.F.R. § 1630.2(p)

Definition of Undue Hardship

(p) Undue hardship--

(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity,

when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and

administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an

individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

EEOC INTERPRETATIVE GUIDANCE TO TITLE I OF THE ADA

29 C.F.R. pt. 1630, App. at §1630.9

The obligation to make reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual

throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related, such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities. See Senate Report at 31; House Labor Report at 62.

It should be noted, however, that the provision of such items may be required as a reasonable accommodation where such items are specifically designed or required to meet job-related rather than personal needs. An employer, for example, may have to provide an individual with a disabling visual impairment with eyeglasses specifically designed to enable the individual to use the office computer monitors, but that are not otherwise needed by the individual outside of the office.

The term "supported employment," which has been applied to a wide variety of programs to assist individuals with severe disabilities in both competitive

and non-competitive employment, is not synonymous with reasonable accommodation. Examples of supported employment include modified training materials, restructuring essential functions to enable an individual to perform a job, or hiring an outside professional ("job coach") to assist in job training. Whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis without regard to whether that assistance is referred to as "supported employment." For example, an employer, under certain circumstances, may be required to provide modified training materials or a temporary "job coach" to assist in the training of a qualified individual with a disability as a reasonable accommodation. However, an employer would not be required to restructure the essential functions of a position to fit the skills of an individual with a disability who is not otherwise qualified to perform the position, as is done in certain supported employment programs. See 34 CFR part 363. It should be noted that it would not be a violation of this part for an employer to provide any of these personal modifications or adjustments, or to engage in supported employment or similar rehabilitative programs.

The obligation to make reasonable accommodation applies to all services and programs provided in connection with employment, and to all non-work facilities provided or maintained by an employer for use by its employees. Accordingly, the obligation to accommodate is applicable to employer sponsored placement or counseling services, and to employer provided cafeterias, lounges, gymnasiums, auditoriums, transportation and the like.

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.

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07-1311

No. ~~07-4404~~

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In the Supreme Court of the United States

Elizabeth Rask,

Petitioner,

v.

Fresenius Medical Care North America,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Petitioner's Statement of the Questions Presented rests on factual inaccuracies and false premises. Respondent submits the following Counter Statement of Questions Presented.

1. Whether the Eighth Circuit Court of Appeals applied well-settled law in determining that Respondent had no duty to accommodate Petitioner's alleged disability because Petitioner failed both to provide sufficient notice of purported limitations resulting from her alleged disability and also failed to make a request for a reasonable accommodation.

2. Whether the Eighth Circuit Court of Appeals applied well-settled law in determining that Petitioner failed to avail herself of the protections of the FMLA because Petitioner failed both to request and to give adequate notice of her alleged need for leave because of a serious health condition.

PARTIES

1. Petitioner Elizabeth Rask ("Rask" or "Petitioner") is a former patient care technician of Bio-Medical Applications of Minnesota, Inc., d/b/a FMC Dialysis Services Duluth (erroneously identified by Petitioner as "Fresenius Medical Care North America" and herein referred to as "BMA" or "Respondent").

2. BMA operates a network of dialysis clinics located in Minnesota and Western Wisconsin. BMA is an "employer" as that term is defined in the ADA and FMLA. BMA's parent company is Bio-Medical Applications Management Company, Inc., which owns 100% of BMA's stock. There is no publicly held corporation that owns 10% or more of BMA's stock.

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OPINIONS BELOW

The Judgment Order of the Court of Appeals affirming the District Court's grant of summary judgment to BMA on all of Rask's claims is attached as Appendix A to the Petition and is reported as *Rask v. Fresenius Med. Care N.A.*, 509 F.3d 466 (8th Cir. 2007). The Court of Appeals' Order denying Rask's Petition for Panel Rehearing and for en banc Rehearing is not officially reported. The District Court Order granting summary judgment to BMA is attached as Appendix B to the Petition and is not officially reported. (Hereinafter, references to Appendix Exhibits to the Petition are cited as "App. [A/B], p. __.")

STATEMENT OF THE CASE

Rask's Statement of the Case contains numerous inaccuracies. The following Statement of the Case accurately reflects the record.

I. RASK'S EMPLOYMENT AND ACKNOWLEDGMENT OF BMA'S POLICIES.

Rask was hired as a regular patient care technician in BMA's dialysis clinic in Duluth, Minnesota on April 15, 2001. (App. B, pp. 29-31.) In this position, Rask was responsible for delivering safe and effective care to dialysis patients suffering from end-stage renal disease. (App. A, p. 16; App. B, p. 56.)

Rask acknowledged that she received a copy of BMA's FMLA policy, which was contained in the Employee Handbook, and that she had regular access to BMA's Human Resources Policy Manual, which contained the FMLA policy as well as BMA's EEO policy and BMA's progressive and cumulative disciplinary program. (App. B, p. 32.)

II. RASK PROGRESSES THROUGH BMA'S DISCIPLINARY PROGRAM AND IS DISCHARGED.

A. Rask's Performance Problems.

Rask was repeatedly counseled and disciplined from December 2002 through October 2003 for performance and attendance-related policy infractions such as being verbally abusive toward coworkers, making routine complaints and other inappropriate statements in the presence of patients, ignoring patient needs and refusing to help staff, using foul language, disrespecting her supervisor, and incurring excessive unscheduled absences. (App. B, pp. 32-36.) Rask progressed through BMA's cumulative disciplinary policy and was suspended in March 2004 for making negative remarks about her supervisor, BMA, her unit, and her coworkers. (App. B, p. 36.)

After her suspension, and at a time when she knew the next step in the progressive disciplinary process was termination, Rask incurred further discipline by violating BMA's attendance policy three more times in March and May 2004. (App. B, pp. 36-38.) Following these infractions, Rask was

terminated in June 2004 for exceeding the maximum allowable number of corrective actions under BMA's policies.[1] (App. B, p. 40.)

B. Rask Provided No Notice to BMA During Her Employment that Her Absences, which Formed only a Partial Basis for Her Termination, were Due to Depression, and She Never Requested FMLA Leave.

Almost two weeks after her discharge, Rask for the first time provided BMA with a doctor's note stating that she had depression. (App. B, p. 39.) During her employment, Rask never submitted doctor's notes for any of her absences that resulted in corrective action, and she did not mention in any of her numerous corrective action meetings with supervisors that she had a mental health condition that required medication or that she was seeing a psychiatrist or psychologist. (*Id.*) The only information Rask presented to BMA in connection with any of her absences took place after her suspension, when she informed her supervisor that

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[1] Rask's assertions that (1) she was told that she was terminated because of her attendance on three occasions, and (2) "[her] employment was terminated for attendance," are flatly contradicted by the record evidence that establishes Rask was terminated for progressing through BMA's cumulative discipline program for a host of policy violations. (Petition, pp. 4-5.) Rask's curious assertion that she "worked successfully for [Respondent] for six years before her employment was terminated" is also in stark contrast to the record. (Petition, pp. 4-5.)

she was "not feeling right" and was having unidentified "side effects" from some unidentified medication she claimed to have been taking. (App. B, pp. 36-37, 39-40.)

Notwithstanding the fact that Rask was aware of, and had access to, BMA's policies and postings concerning EEO, FMLA, and ADA, she never discussed or requested FMLA leave. (App. B, p. 39.) Nor did Rask ever initiate any interactive dialogue regarding her health or request any accommodation in the form of extended sick leave. (App. A, pp. 19-20.) When BMA asked Rask in one of her many corrective action meetings whether there was "anything that [BMA] could do for her, was there anything wrong" Rask simply stated that she was sick on one of the days she was absent, and then resorted to criticizing BMA and its employees, stating that she was underappreciated and that BMA was a "terrible place to work." (App. B, pp. 35, 37.) Rask did not offer specific facts of a single discussion in which she advised her supervisors that she had been diagnosed with depression, that the medication she was taking was to treat depression, or that her absences were in any way causally related to depression.[2]

---

[2] Rask's assertion that she "told her supervisor and her supervisor's manager of her depression and her requiring medication for its treatment" is simply not supported by the record. (Petition, p. 5.)

III. RASK FILES A LAWSUIT ALLEGING DISABILITY DISCRIMINATION AND FMLA INTERFERENCE, WHICH THE DISTRICT COURT DISMISSES ON SUMMARY JUDGMENT.

A. Rask's Claims.

Rask filed a complaint against BMA in the United States District Court, District of Minnesota, on June 28, 2005, alleging that her termination violated the Family Medical Leave Act, the Americans With Disabilities Act, and the Minnesota Human Rights Act. Rask also claimed that BMA violated the ADA and the MHRA by failing to provide her a reasonable accommodation for her disability.

B. The District Court Dismisses of all of Rask's Claims.

On October 26, 2006, the District Court granted BMA's motion for summary judgment and dismissed all of Rask's claims. (App. B.) The District Court found that Rask failed to establish a genuine issue of material fact with respect to her ADA claims of disability discrimination and failure to accommodate. Specifically, the District Court concluded that Rask failed to establish that she had a disability because the evidence did not demonstrate a substantial limitation in the major life activities of thinking, concentrating, sleeping, or working.

The District Court also concluded that Rask was not "otherwise qualified" under the ADA, with or without a reasonable accommodation, as Rask failed

to meet BMA's expectation that she avoid accumulating unscheduled absences and avoid conducting herself inappropriately toward patients, staff, and supervisors. Further, because Rask offered no notice of her mental health condition or need for time off because of it, BMA had no knowledge of Rask's alleged depression and no duty to provide a reasonable accommodation. The District Court also found that BMA identified a legitimate, non-discriminatory reason for Rask's discharge – she progressed through BMA's cumulative disciplinary program.

With respect to Rask's FMLA interference claim, the District Court concluded that Rask's vague comments about her medication and being sick were insufficient to notify BMA that she had a serious health condition or sought leave for such a condition. As such, Rask was not entitled to the protections of the FMLA. The District Court entered judgment on October 27, 2007.

IV. RASK APPEALS TO THE EIGHTH CIRCUIT, WHICH AFFIRMS THE DISTRICT COURT JUDGMENT.

Rask filed a Notice of Appeal from the District Court's Judgment on November 21, 2006. The Eighth Circuit Court of Appeals affirmed judgment on December 6, 2007.

The Court of Appeals declined to decide whether Rask was disabled because, regardless of the evidence relating to that element of her ADA claim, Rask failed to show she was otherwise qualified to

perform an essential function of her job – reliably and consistently showing up for work. Furthermore, BMA had no duty to accommodate Rask because Rask failed as a matter of law to provide sufficient notice of the limitations resulting from her alleged disability. Finally, the Court of Appeals held that, even assuming BMA was properly notified, Rask's requested accommodation to allow her to take sudden, unscheduled absences was unreasonable as a matter of law given the specific circumstances of her employment.

The Court of Appeals also affirmed judgment as to Rask's FMLA claim. The Court of Appeals held that, as a matter of law, Rask failed to give proper notice of her request to take FMLA leave for a serious health condition. Vague, out-of-context references to medication and even use of the word "depression," the Court of Appeals concluded, did not trigger a duty on BMA's part to provide Rask with leave.

Rask filed a petition for panel and en banc rehearing of the Court of Appeals' decision on December 19, 2007, alleging that her claims presented special and unique facts. On January 18, 2008, the Court of Appeals denied Rask's Petition for rehearing.

V. RASK FILES A PETITION FOR WRIT OF *CERTIORARI*.

Rask filed a Petition for Writ of *Certiorari* in this Honorable Court on April 15, 2008. The Petition was docketed on April 18, 2008.

REASONS FOR DENYING THE PETITION

I. THE CRITERIA OF SUPREME COURT RULE 10 ARE NOT SATISFIED.

This Court has complete discretion to determine whether to grant a petition for *certiorari*, and a petition will be granted only for compelling reasons. (Sup. Ct. R. 10.) Generally, a petitioner must be able to demonstrate that: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals; (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. (Sup. Ct. R. 10.)

None of the above considerations exists in this case. Rather, the Court of Appeals applied appropriate, well-reasoned, and established legal standards for evaluating ADA and FMLA claims to the record evidence in concluding that Rask's claims lacked merit as a matter of law. Accordingly, and for the reasons set forth below, the Petition should be denied in its entirety.

II. THE COURT OF APPEALS DETERMINATION THAT BMA HAD NO DUTY TO ACCOMMODATE RASK'S ALLEGED DISABILITY IS NOT WORTHY OF SUPREME COURT REVIEW.

A. The Court of Appeals Applied Well-Settled Law in Determining that Rask Failed to Provide Notice to BMA of Her Limitations.

1. The Standard for Employee Notice is Well-Established and Well-Informed.

The Eighth Circuit consistently holds that:

> [w]here the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, *the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.*"

See, e.g., Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681, 689 (8th Cir. 1998) (italics in original, underlined emphasis added), *cert. denied,* 526 U.S. 1004 (1999); *see also Toyota Motor Mfg., Ky. v. Williams,* 534 U.S. 184, 193 (2002) (the ADA requires employers to provide accommodations to the known physical or mental limitations of an otherwise

qualified individual with a disability unless such covered entity can demonstrate that the accommodation would impose an undue hardship); *Miller v. National Cas. Co.*, 61 F.3d 627, 629 (8th Cir. 2005) (citing 29 C.F.R. App. § 1630.9) (to prove discrimination, an employee must show that the employer knew, or should have known, of the employee's substantial physical or mental limitation).

If the employee fails to meet her burden to identify her disability, specifically identify her resulting limitations, and suggest a reasonable accommodation, summary judgment is appropriate on the employee's failure to accommodate claim because the employer's duty to accommodate is not triggered. *See, e.g., Russell v. TG Mo. Corp.*, 340 F.3d 735, 742 (8th Cir. 2003) (absent evidence that employee told her manager that the reason she needed to leave work was because of bipolar disorder, termination of employee for attendance infractions was insufficient to support claim for failure to accommodate); *Wallin*, 153 F.3d at 689 (affirming summary judgment to employer where employee requested transfers but made no connection between these requests and his disabilities).

The above decisions, and others from the Eighth and other circuits, recognize the clear distinction that exists between an employer's knowledge of a condition and the employer's knowledge of the limitations experienced as the result of the condition. The requirement that an employee provide her employer with knowledge of both is, therefore, entirely justified. *See Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th

Cir. 1996), *cert. denied*, 519 U.S. 1029 (1996) (the ADA requires employers to reasonably accommodate limitations associated with a disability, not the disability itself); *see also* 42 U.S.C. §§ 12102(2)(A)-(C) (defining "disability" to include a physical or mental impairment that substantially limits one or more of the major life activities of such individual) (emphasis added).

2. The Court of Appeals Correctly Applied the Established Standard for Employee Notice.

The Court of Appeals correctly concluded that the standard in *Wallin* applied in this case. Rask's alleged disability, resulting limitations, and necessary reasonable accommodations were not open, obvious, and apparent. Rask never submitted any written documentation about her alleged depression, treatment, or medication to BMA at any time during her employment. Nor did Rask offer specific evidence of a single discussion in which she advised her supervisors that she had depression that was causally related to her absences. Accordingly, Rask had a duty to specifically identify the disability and resulting limitations and to suggest reasonable accommodations in order to trigger BMA's duty to accommodate her limitations.

The Court of Appeals also correctly concluded that Rask failed to meet her burden in both respects. The record is completely devoid of Rask providing BMA with any information relating to her absences other than vague references to medication, "not feeling right," and being sick. Despite the many

conversations that Rask's supervisors had with her about attendance and performance, Rask never specifically identified any limitations she was experiencing. *Taylor*, 93 F.3d at 165 (holding that an employee had not given sufficient notice to trigger his employer's duty to engage in the interactive process because, although the employee mentioned to his employer that he was diagnosed with bipolar disorder, nothing the employee had done suggested the nature of his illness). The Court of Appeals' conclusion that Rask's conduct did not to trigger BMA's duty to engage in the interactive process with her was the result of a straightforward application of established law.

3. The Court of Appeal's Decision does Not Conflict with EEOC Enforcement Guidance.

Rask argues that the Court of Appeals' holding on Rask's insufficient notice runs contrary to EEOC enforcement guidance. (Petition, pp. 12-13.) EEOC guidance relating to the ADA is just that, and a conflict between a court of appeals decision and EEOC guidance does not entitle a petitioner to a review of her case by this Court. Regardless, no such conflict exists in this case.

The EEOC guidance cited by Rask relates only to whether an employee has requested an accommodation, not whether an employee has identified her limitations. The act of requesting an accommodation, however, does not independently satisfy an employee's other obligations under the

ADA to specifically identify the disability and the resulting limitations when they are not open, obvious, and apparent. *Wallin*, 153 F.3d at 689. The EEOC commentary relating to a request for accommodation is therefore inapplicable to the question presented here.

B. The Court of Appeals' Applied Well-Settled Law in Holding that Rask Failed to Request a Reasonable Accommodation.

1. There is a Well-Established Standard for Analyzing Whether a Requested Accommodation is Reasonable on a Case-by-Case Basis.

Congress and the Department of Labor have made clear that the reasonableness of a requested accommodation depends on the circumstances of the case in question. *See* 42 U.S.C. § 12112(b)(5)(A)(9) (the term "reasonable accommodation" may include job restructuring, part-time or modified work schedules, and other similar accommodations for individuals with disabilities); 29 C.F.R. § 1630.2 (same). This Court has also deemed individualized attention to disability claims "essential." *See School Bd. v. Arline*, 480 U.S. 273, 287 (1987). As such, the question of whether an accommodation is reasonable requires a case-by-case analysis. *See, e.g., Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122 (2d Cir. 1999); *Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir. 1998).

Notwithstanding the individualized inquiry, courts widely recognize that an the ADA does not require an employer to eliminate or reallocate essential job functions to accommodate a disabled employee, and requests for such accommodations are widely regarded as unreasonable as a matter of law. *See, e.g., Dvorak v. Mostardi Platt Assocs.*, 289 F.3d 479, 484-85 (7th Cir. 2002); *Martin v. Kansas*, 190 F.3d 1120, 1133 (10th Cir. 2001); *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 26 (1st Cir. 2001); *Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991). The Third Circuit has espoused this same principle with specific reference to 29 C.F.R. § 1630.2(o)(1)(ii) in finding that a "blanket requirement" that an employer provide additional leave for depression is beyond the scope of the ADA when the absent employee "simply will not be performing the essential functions of her position." *Walton v. Mental Health Assoc. of S.E. Penn.*, 168 F.3d 661, 669 (3d Cir. 1999) (quoting the Federal Regulations, which provide:

> the obligation to make reasonable accommodation . . . does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assist the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on

> and off the job, it will be considered a personal item that the employer is not required to provide.

29 C.F.R. §§1630.2(o)(ii), (iii)).

Regardless of their precise wording, all of these cases, like the Eighth Circuit opinion in this matter, support the proposition that an accommodation is reasonable only if it enables the employee to perform the essential functions of the job.

2. The Court of Appeals Correctly Applied the Standard for Analyzing Requests for Accommodation in this Case.

A cursory reading of the Court of Appeals' decision makes clear that it analyzed Rask's request under the specific facts and circumstances of Rask's employment. The only evidence in the record that could potentially be deemed a request by Rask for accommodation is her statement to her supervisors that "I might miss a day here and there because of [my medication]." (App. A, p. 26.) As the Court of Appeals noted, Rask's requested accommodation amounted to a request for permission to take "sudden," "unscheduled," and "unanticipated" absences at a time when BMA had already decreased Rask's schedule to two days of work per week at Rask's request. (App. A, pp. 19-20.)

In analyzing the reasonableness of Rask's request, the Court of Appeals noted the following circumstances relating to Rask's employment: (1) Rask made no showing that BMA would be able to

staff its operations on short notice at times when it expected Rask to be at work; (2) Rask did not have the kind of job that could be performed from another site or put off until another time, as she cared for seriously ill patients in need of dialysis; (3) Rask had already been permitted to modify the number of hours that she worked; and (4) at the time of her termination, Rask was working only two days a week and already had substantial time away from work and could take more (scheduled time away from work) if she needed it. (App. A, pp. 17, 19-20.) Based on these facts, and because, under these circumstances, the ability to take sudden, unscheduled absences would have been for Rask's personal benefit rather than to assist her in performing the duties of her job, the Court of Appeals held that permitting Rask to take "sudden," "unscheduled," and "unanticipated" absences "cannot as a matter of law be a reasonable accommodation given the circumstances of Ms. Rask's employment." (App. B, pp. 19-20) (emphasis added). The Court of Appeals' holding does not create a bright line rule. It is the product of a quintessential fact-specific analysis, consistent with well-recognized and universal authority.

3. Rask is Simply Wrong in Asserting that the Court of Appeals' Decision Runs Contrary to Other Authority.

Rask, who never requested a reasonable accommodation during her employment, baldly alleges the following three arguments in support of

her Petition as it relates to whether her after-the-fact proposed accommodation was reasonable: (1) the Court of Appeals created a "rule that a request by a disabled person for time off on short notice is an unreasonable accommodation not required to be provided by the ADA"; (2) the Court of Appeals' holding that Rask's requested accommodation was unreasonable as a matter of law runs contrary to precedent; and (3) the Court of Appeals misinterpreted 29 C.F.R. §§1630.2(o)(ii), (iii). (Petition, p. 10.) Rask misreads both the Court of Appeals' decision and the authority she cites in support of her contentions.

It is obvious that the Court of Appeals did not establish any bright line rule relating to reasonable accommodations. Instead, the Court of Appeals engaged in a fact-specific analysis and determined that Rask did not request an accommodation that was reasonable under the circumstances of her employment. There is no merit to Rask's unsubstantiated assertion that a "rule" was created in this case.

Second, Rask misreads all the authority she cites in an effort to support her argument that the Court of Appeals' decision runs contrary to the decisions of other Circuits and the EEOC interpretive guidance regarding the allowance of time away from work as a reasonable accommodation. Contrary to Rask's parenthetical relating to *Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996), that case does not stand for the proposition that "'paid sick leave, paid personal days, a voluntary time off program, and ample and flexible vacation time' constitute

reasonable accommodation." (Petition, p. 11.) *Hankins* stands for nothing more than that such accommodations are "potential" forms of reasonable accommodation.[3] *Hankins*, 84 F.3d at 801. Furthermore, both *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996),[4] and the EEOC's Interpretive Guidance, 29 C.F.R. Part 1630, app. 1630, discuss reasonable accommodations in potential, permissive language, reaffirming the case-by-case nature of reasonable accommodation analysis. (Petition, p. 11.)[5]

Finally, Rask takes issue with the Court of Appeals' conclusion that, under the circumstances of her employment, sudden, unscheduled absences would have been primarily for Rask's personal benefit. (App. A, p. 20.) In support of the contention that the Court of Appeals misinterpreted the Federal Regulations, Rask asserts that 29 C.F.R.

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[3] Notably, the Tenth Circuit in *Hudson* held, as a matter of law, that the employee's request of unpaid leave in that case was unreasonable.

[4] Notably, the Sixth Circuit in *Hankins* affirmed summary judgment to the employer-appellee.

[5] Rask misleadingly quotes language from *Dark v. Curry County*, 451 F.3d 1078, 1090 (9th Cir. 2006); that "there remains a genuine issue of material fact as to whether Dark could reasonably have been accommodated by his request for leave sufficient to permit his transition to new medication." (Petition, p. 11.) First, there is no evidence in the record that Rask ever requested leave as a reasonable accommodation during her employment. Any case analyzing facts under which an employee made such a request is thus wholly inapplicable. Regardless, in the sentence preceding the language Rask quotes, the Ninth Circuit in *Dark* specifically recognized that its holding was based on the "specific circumstances of [plaintiff's] case."

§§1630.2(o)(ii), (iii) "is only negating the suggestion that an employer must provide certain tangible physical items as a reasonable accommodation." (Petition, p. 12) (emphasis added). Rask cites no authority for such a limited reading of the Regulation, and there is simply no basis – beyond wishful thinking – for adding this gloss to the regulatory provision.

There is no basis for further review of the Court of Appeal's decision affirming judgment to BMA on Rask's ADA claim. The Court should deny the Petition.

III. THE EIGHTH CIRCUIT COURT'S DETERMINATION THAT RASK FAILED TO AVAIL HERSELF OF THE PROTECTIONS OF THE FMLA DOES NOT WARRANT SUPREME COURT REVIEW.

A. The Court of Appeals' Applied Well-Settled Law to the Facts of this Case in Holding that Rask Failed to Provide Notice of Her Need for Leave Due to a Serious Health Condition.

1. The Standard for Employee Notice is Well-Established.

To establish a claim of unlawful interference under the FMLA, an employee must establish the following five elements: she was eligible for the FMLA's protections, 29 U.S.C. § 2611(2); her employer was covered by the FMLA, 29 U.S.C. § 2611(4); she was entitled to leave under the FMLA,

29 U.S.C. 2612(a)(1); she provided sufficient notice of her intent to take leave, 29 U.S.C. § 2612(e)(1); and her employer denied her FMLA benefits to which she was entitled.

The statute does not specify what kind of notice an employee is required to give of her intent to take FMLA leave when the need for leave is unforeseeable, and the courts have declined to announce any categorical rules for the required content of the notice. (App. A, p. 21); *see also Willis v. Coca Cola Enters.*, 445 F.3d 413, 419 (5th Cir. 2006); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 763 (5th Cir. 1995). Of course, an employee may specifically reference the FMLA, thereby satisfying the notice requirement, but she is not required to do so. *Manuel v. Westlake*, 66 F.3d 758, 764 (5th Cir. 1995)

In the absence of an express request for FMLA leave, courts consistently hold that to provide sufficient notice under the FMLA, employees must impart sufficient information to the employer reasonably to apprise it of the employee's request to take time off due to a serious health condition. (App. A, p. 22) (citing *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999), *cert. denied*, 528 U.S. 1050 (1999)); *see also Greenwell v. State Farm Mutual Automobile Ins. Co.*, 486 F.3d 840, 842 (5th Cir. 2007); *Willis v. Coca Cola Enters.*, 445 F.3d 413, 419 (5th Cir. 2006). Failure to provide sufficient notice that the employee has a serious health condition and that leave is needed due to the condition is grounds for summary judgment.

2. The Court of Appeals Applied the Correct Standard for Employee Notice.

The Court of Appeals recognized that Rask was required to provide sufficient notice that she had a serious health condition and that she needed leave because of it. *See* App. B, p. 22 (citing *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990-91 (8th Cir. 2005) for the proposition that "[b]ecause a serious health condition is a prerequisite for FMLA leave, an employee must provide information to the employer 'to suggest that his health condition could be serious'" as opposed to "ordinary 'sick-days.'") This requirement, and the distinction between notifying an employer of a serious health condition and notifying employer of an ordinary sick day, is based squarely in the applicable case law and statutory and regulatory provisions.

Courts consistently hold that a complaint of sickness or a vague reference to a mental condition does not satisfy the notice requirement, even if the underlying condition may qualify as a serious health condition. *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1007 (7th Cir. 2001); *Willis*, 445 F.3d at 419 (affirming summary judgment to employer where employee complained of sickness but did not inform her supervisor that her sickness was due to complications in her pregnancy and, thus, did not clearly link her sickness to a serious health condition); *Seaman v. CSPH, Inc.*, 179 F.3d 297, 302 (5th Cir. 1999) (holding that the employee's reference to his mental condition did not constitute the

requisite notice of an intent to invoke FMLA leave); *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980 (5th Cir. 1998) (holding that the "meager" information provided to the employer concerning the employee's alleged illness was insufficient FMLA notice).

3. The Court of Appeals Correctly Applied the Standard in Concluding that Rask Failed to Provide Sufficient FMLA Notice.

The Court of Appeals correctly held that, under established legal principles, Rask failed to give proper notice of her need to take leave under the FMLA because she failed to inform BMA that she had depression, that her depression was a serious health condition, and that she needed to take leave because of it. Rask chose not to reference or request FMLA leave during her employment. In fact, according to Rask, she chose not to do so because her "doctor preferred that [she] tried to stay working." (App. B, p. 39.) Additionally, Rask never advised her supervisors that her absences were in any way related to a condition of depression, even if she mentioned the word "depression" in a routine, non-medical conversation with her supervisor at some unidentified time during her employment, and she certainly never provided BMA enough information to determine that she had depression and that it constituted a serious health condition. *See Collins*, 272 F.3d at 1008 (affirming summary judgment to employer on plaintiff's FMLA claim because, in advising his employer that he was "sick," employee

did not specifically link his absence to depression or provide information sufficient to establish that his depression was a serious health condition, despite employee's contention that he had previously mentioned his depression to his supervisor).

Rask failed to give proper notice. As a result, BMA had no duty to inquire or provide Rask with FMLA leave.[6] BMA was not required to engage in pure speculation into the reasons Rask was not performing her job. *See Satterfield*, 135 F.3d at 980 (FMLA requires only a limited inquiry, and employers are not required to be clairvoyant). The Court of Appeals properly affirmed judgment on Rask's FMLA claim.

B. Rask Misunderstands the Court of Appeals' Decision.

Rask's assertion that the Court of Appeals has decided important questions of federal law rests on a confused reading of the decision. (Petition, p. 7.) The Court of Appeals did not, as Rask contends, apply a "surgical distinction" between Rask's alleged depression and the side effects she was experiencing from her medication. (Petition, p. 8.) Rather, Rask's failed to provide BMA with any notice that the side effects she claims to have been experiencing were in some way related to a serious health condition, and

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[6] As set forth above, notwithstanding Rask's failure to inform her supervisors about the specifics of her condition, her supervisors nonetheless made several inquiries to Rask about her health and whether there was anything BMA could do to help her when she was failing to perform up to expectations.

that failure stands as the basis for the Court of Appeals' decision. Without any evidence that Rask notified BMA of a causal connection between her medication side effects and her alleged depression, the Court of Appeals had no basis to treat the two as interrelated concepts within the notice analysis. Rask, not the Court, is responsible for the separation between Rask's alleged depression and her medication.

Rask reveals her confusion about the Court of Appeal's holding on her FMLA claim through her use of inapplicable hypothetical examples. (Petition, pp. 8-9.) Rask's three examples are wholly inapplicable to her case, as all of them assume critical facts relating to notice that are not present in this case. Namely, the examples assume (1) that the employer has knowledge that the employee has a serious health condition, and (2) that the employer has knowledge of the direct relationship between the condition, and the complications, side effects, or setbacks resulting from the serious health condition. (*Id.*) This, of course, is what distinguishes Rask's case from her illustrations and precludes the examples from being applied in any meaningful way to the Court of Appeals' decision.

CONCLUSION

For the reasons set forth herein, BMA respectfully requests that Rask's request for a writ of *certiorari* to review the decision of the Eighth Circuit Court of Appeals be denied in its entirety.

Dated: May 19, 2008

Respectfully Submitted,

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IN THE

Supreme Court of the United States

ELIZABETH RASK,

Petitioner,

v.

FRESENIUS MEDICAL CARE NORTH AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

A. Respondent Argues Disputed Facts And Largely Avoids The Issues Raised In The Petition

As this case wound its way through the court system to its highest tribunal, one common engine drove respondent's arguments along the way: the notion that respondent's facts were the only facts, no matter what else the record had to offer. From the extraordinary (and irrelevant) effort to argue to this Court who the employer was (BMA v. Fresenius -- a long dead issue), to its continued denial of what petitioner's supervisors knew of her illness and medications, to its misrepresentation of what petitioner knew of its Family and Medical Leave Act (FMLA) policy and, finally, to its denial of what it told petitioner was the very reason why it fired her – respondent has consistently plunged ahead with presenting as "facts" matters that are disputed by the record evidence.

In its opposition brief, respondent cites to the District Court opinion on summary judgment as its source for some of these disputed facts. The disputed nature of these facts and the District Court's fact finding on summary judgment, however, was the essence of petitioner's initial appeal to the Eighth Circuit. Summary judgment in employment litigation reached a new plateau in this case, one unimagined by the Supreme Court when its trilogy of Rule 56 cases was decided in the mid 1980's. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); Fed. R. Civ. Pro. 56. The District Court engaged in significant fact finding, resolving key disputes against petitioner to reach its ultimate conclusion.[1] The Court of

[1] For example, the District Court first noted the following testimony from petitioner in its opinion: "According to Rask, she explained why she left

Appeals avoided many of these landmines, but nonetheless read inferences from facts about what respondent knew of petitioner's illness and medication against petitioner and ignored an affidavit from petitioner. When this Court reads the opposition to certiorari filed by respondent, it needs to be aware that the "facts" recited therein were hotly disputed in the courts below.

Respondent's opposition brief simply drags the argument into the world of "he said/she said", something petitioner has contended all along belonged to the realm of a jury and not summary judgment. This petition, however, is about much more than simply a failure to follow Rule 56. It is about a precedent that threatens the family and medical leaves of workers who need time off because of the side effects of treatment and not simply because of the underlying serious health condition. It is also about whether time off from work to see a doctor in the Eighth Circuit is just as much a reasonable accommodation under the Americans with Disabilities Act as it is in other circuits, or whether such time off is not a reasonable accommodation because it "personally benefits" the employee in some way, as the Eighth Circuit erroneously reasoned. These are questions of no small

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[on March 22] and Mitchell [a manager] said, 'this is the first time I've heard about any depression or anything.' (Pet. App. B at 37). The District Court then noted the contrary testimony of Pedersen and Mitchell, stating "Mitchell denied knowledge that Rask was suffering from depression[.]".. Id. The Court then held that "[d]espite the many conversations that Rask had with Pederson [Rask' supervisor] and Mitchell about her attendance and performance, Plaintiff did not mention that she was suffering from depression[.]"(Pet. App. B at 61)(emphasis added). In yet another place in its opinion, the District Court said, "Here, the record overwhelmingly reflects that Rask failed to notify Defendant of her depression[.]" (Pet. App. B at 60). The Court could only have reached this conclusion by accepting Pedersen and Mitchell's testimony and rejecting petitioner's, this on a mere paper record with no trial. The Supreme Court could never have intended such a use for Rule 56 when it decided the trilogy above.

importance to the average worker who could be healthy one day and in need of protected time off to see a doctor the next.

B. Respondent's Argument That The Court Held That Notice Of A Need For FMLA Leave Was Inadequate Because Petitioner Gave Respondent No Link Between The Medications And The Depression Is Factually Wrong, It Requires The Appellate Court To Have Ignored The Affidavit And Deposition Of Petitioner To The Contrary, And It Is An Invitation To Summary Reversal

Contrary to respondent's argument, the appellate court's holding on the sufficiency of the notice provided by petitioner of her need for FMLA leave depended *entirely* on whether the Court included notice of her medication's side effects in the equation. To suggest as respondent has that what the Court really meant to say was that the employer did not know that the medications were for the depression and so the two could not be linked for purposes of notice is not supported by the record.[2]

To reach respondent's conclusion, the Court would had to have ignored entirely petitioner's affidavit to the District Court in which she testified:

> "My depression was generally widely known at Fresenius and was well known to my supervisor Patty Pedersen. We discussed it on many occasions. We also discussed the medications I was taking and that they

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[2] (Resp. Opp. Br at 24)("Without any evidence that Rask notified BMA of a causal connection between her medication side effects and her alleged depression, the Court of Appeals had no basis to treat the two as interrelated concepts within the notice analysis.")

> were for depression. I discussed with Ms. Pedersen how my depression affected my ability to concentrate, that I could not focus or think clearly and that I did not trust myself working with patients when the depression was at its most severe. When I worked at Eveleth there were numerous discussions at work with Ms. Pedersen present about my being on Prozac."

(Appellant's App. to Ct. of Appeals at 95-96)[3]

Petitioner also testified that she told her supervisor on May 28, 2004, just days before her termination: "I talked to Patty and I said, 'Patty, I'm having -- I talked to my doctor and they want me to come in tomorrow, I won't be able to work. I need help with my medication still, I'm still having a lot of side effects from what they put me on.'" (Appendix to Ct. of Appeals at 114 -- Rask depo. at 158).

The explanation of the Court's opinion offered by respondent therefore does not square with the record. To follow respondent's argument, the Court would have ignored the petitioner's record evidence and would have beyond any doubt violated Rule 56. The distinction respondent urges is an admission by respondent of error and is proper grounds for summary reversal by this Court. U.S. Sup. Ct. R.16.1.

Respondent complains that petitioner did not mention the FMLA (Resp. Opp. Br. at 22), nor did she get a doctor's note when she told them of her need to see the doctor (Resp.

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[3] (Cf. Resp. Opp. Br. at 4, fn.2, erroneously claiming that "Rask's assertion that she 'told her supervisor and her supervisor's manager of her depression and her requiring medication for its treatment' is simply not supported by the record.").

Opp. Br. at 5), but neither of these are required by the FMLA. 29 C.F.R. § 825.303(b) ("The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means.")

It was only when the Court of Appeals elected to parse the notice of depression from the notice of the effects of medication for the depression that the notice was held to be inadequate under the FMLA. That is where the Court erred and is where the decision threatens all who are treated for serious health conditions, suffer side effects from the treatment and need FMLA leave to see the doctor to fix the problem.

The issue becomes a jury question only because respondent disputes what petitioner told it. Unless summary judgment law has become so skewed that judges are now free to decide credibility on paper records, this case must be remanded to allow a jury to do what juries do best: decide who to believe.

C. Respondent's Argument That The Court Of Appeals Engaged In A "Fact Specific Analysis" on Petitioner's ADA Claim Requires That The Appellate Court Have Ignored Record Evidence From Petitioner And Would Allow For Summary Reversal By This Court

Respondent presents another argument for summary reversal when it attempts interpretation of the Court of Appeals' holding on the American's with Disabilities Act (ADA) claim. Respondent contends that the Court simply engaged in a "fact specific analysis" to come to the conclusion that there was no duty to reasonably accommodate petitioner's depression by providing her with time off to see

the doctor. (Resp. Opp. Br. at 16-17). If respondent were correct, this "fact specific analysis" would also have had to violate Rule 56 and would be an easy decision for the Supreme Court to summarily reverse.

The undisputed evidence shows that respondent failed to meet its duty to engage in an interactive process with petitioner to determine a reasonable accommodation. The Eighth Circuit has previously acknowledged that, "Under the ADA, an employer must engage in an interactive process to identify potential accommodations that could overcome the employee's limitations. *Burchett v. Target Corp.*, 340 F.3d 510, 517 (8th Cir. 2003. `[T]he failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith.'" *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1021 (8th Cir. 2000) (citation omitted). For the Court of Appeals to have engaged in a "fact specific" analysis, it would had to have ignored the undisputed evidence that respondent failed to engage petitioner in the very fact finding process that the appellate court previously said was required.

The Court would also have had to ignore the following facts of record:

> 1. Respondent had policies allowing for time off, including personal leave time ("PTO"), extended sick leave ("ESL") and FMLA time off. (Appellant's App. to Ct. of Appeals at 139-41). At the time of her termination, petitioner still had 48.5 hours of unused PTO available to her. (Appellant's App. to Ct. of Appeals at

> 86). The policies and the fact that petitioner had time available to her under the policies are prima facie evidence of an ability to accommodate.
>
> 2. Respondent did not replace petitioner for ten months after her termination, indicating that her presence was not so urgently needed as respondent suggests. (Appellant's App. to Ct. of Appeals at 38).
>
> 3. Respondent was overstaffed at the time petitioner requested time off to see her doctor. Respondent admitted this to the Court of Appeals when it argued the following: "She [Rask] knew her unit was overstaffed around the time of her discharge, and admits that a further hours reduction was something BMA 'could have done'[.]" (Resp. Br. to Court of Apps. at 41-42)

In *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002), this Court found that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases. . . Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."

A request for time off to see a doctor to have medications adjusted when a company is overstaffed and an employee has 48.5 hours of PTO time available to her under the company's own policies "seems reasonable on its face".

Barnett, *supra*. Being overstaffed, if respondent was concerned about short notice absences, it could simply have offered an alternative block of time off for petitioner, consistent with its time off policies, to get her medications straightened out. The interactive process discussed earlier allows the employer the opportunity to select the accommodation that works best. By failing to even engage in the process, however, respondent violated the ADA.

What is clear from the record is that respondent at no time offered any actual proof of any undue hardship caused by petitioner's three days of absence to meet its burden of proof under the ADA. Respondent never offered proof of any employees who worked any extra hours or found their shifts more burdened. It offered no proof of any additional expense. It offered only conclusory speculation.

Respondent's claim that the Court of Appeals found as a factual matter that petitioner did not give adequate notice of her disability to respondent sufficient to trigger a duty to reasonably accommodate would again be a basis for error if true. (Resp. Opp. Br. at 11). Respondent bases this argument on the erroneous factual assertion that petitioner never "offer[ed] specific evidence of any conversation in which she advised her supervisors that she had depression that was causally related to her absences." Id. This claim ignores the deposition testimony and affidavit of petitioner recited above in which she testified about those very conversations. (Appellant's App. to Ct. of Appeals at 95-96 – Rask affidavit, and 114 -- Rask depo. at 158). It also ignores the following testimony from petitioner:

> "She [Pederson] knew about my medication management, I was having problems with my medication, I was having side effects from my

> medication, and she knew I was, I was having problems and I needed to get my medication adjusted and she knew I was seeing a doctor about it, I let her know that."

(Appellant's App. to Ct. of Appeals at 109).

> "And then the next time I worked, Chris and Patty had a meeting with me, because they wanted to know why I left that day. And I explained in there and Chris was like, 'Well, this is the first time I've heard about any depression or anything,' and that's because Patty hadn't said nothing to her I guess.
>
> But I just kind of asked and let them know that I'm having problems with my medication and, you know, would you stand by me, I might miss a day here and there because of it, but, you know, I've been here for almost six years with this company, can you stand by me now. And when I left out there, it seemed like yeah, they would, you know.
>
> But the next time I talked to Patty, I called her and I said, "I can't make it, the doctor told me I can't go to work, I need to come in and have my medication redone[.]"

Id. Petitioner was fired a few days later. Id.

The above is beyond doubt a "real world" request for the accommodation of time off to see a doctor to get medications redone. The law imposed no requirement that she put the request in writing as respondent urges, nor was there any elegant form the law required her request to take.

The real issue on certiorari review of the ADA claim is the view by the Eighth Circuit that time off from work is not a reasonable accommodation because it benefits the employee personally. Respondent has no answer for this issue, other than to suggest that the Court must have engaged in fact finding and was not setting a "bright line rule". (Resp. Opp. Br. at 16-19).

If the Court of Appeals truly engaged in a "fact specific analysis" as respondent urges, it would had to have ignored petitioner's record and have viewed respondent's facts in a vacuum devoid of all context. It would had to have made assumptions and drawn inferences unfavorable to petitioner, all of which would be a clear violation of Rule 56 and grounds for summary reversal by this Court.

Respondent's effort to distinguish cases from the other circuits in conflict with this decision is a meaningless effort that completely misses the point. The importance of those cases in comparison to the instant case is that the cited cases recognized that time off can be a reasonable accommodation under the ADA, whereas the instant case holds time off to be a matter that benefits the employee personally and is therefore an unreasonable accommodation.[4]

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[4] Respondent's claim that *Walton v. Mental Health Ass'n. of Southeastern Pennsylvania*, 168 F.3d 661 (3rd Cir. 1999) relied on the same federal ADA regulation as the one at issue in the petition is erroneous and deceptive. *Walton* was not interpreting the regulation respondent quotes it as interpreting. Respondent quotes the text of the regulation that is at issue here (29 C.F.R. Part 1630, App. at §1630.9) but then it incorrectly

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CONCLUSION

Based upon the foregoing, petitioner respectfully requests that the Supreme Court grant her request for a writ of certiorari. In the alternative, petitioner respectfully requests that the Supreme Court summarily reverse the decision of the Eighth Circuit as clearly violating Rule 56 and remand the matter for trial.

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Respectfully Submitted,

Dated: May 27, 2008.

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No. [redacted]

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ELIZABETH RASK,

Petitioner,

v.

FRESENIUS MEDICAL CARE
NORTH AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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C. Respondent's Argument That The Court Of Appeals Engaged In A "Fact Specific Analysis" on Petitioner's ADA Claim Requires That The Appellate Court Have Ignored Record Evidence From Petitioner And Would Allow For Summary Reversal By This Court. 5

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ARGUMENT

A. Respondent Argues Disputed Facts And Largely Avoids The Issues Raised In The Petition

As this case wound its way through the court system to its highest tribunal, one common engine drove respondent's arguments along the way: the notion that respondent's facts were the only facts, no matter what else the record had to offer. From the extraordinary (and irrelevant) effort to argue to this Court who the employer was (BMA v. Fresenius -- a long dead issue), to its continued denial of what petitioner's supervisors knew of her illness and medications, to its misrepresentation of what petitioner knew of its Family and Medical Leave Act (FMLA) policy and, finally, to its denial of what it told petitioner was the very reason why it fired her – respondent has consistently plunged ahead with presenting as "facts" matters that are disputed by the record evidence.

In its opposition brief, respondent cites to the District Court opinion on summary judgment as its source for some of these disputed facts. The disputed nature of these facts and the District Court's fact finding on summary judgment, however, was the essence of petitioner's initial appeal to the Eighth Circuit. Summary judgment in employment litigation reached a new plateau in this case, one unimagined by the Supreme Court when its trilogy of Rule 56 cases was decided in the mid 1980's. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); Fed. R. Civ. Pro. 56. The District Court engaged in significant fact finding, resolving key disputes against petitioner to reach its ultimate conclusion.[1] The Court of

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[1] For example, the District Court first noted the following testimony from petitioner in its opinion: "According to Rask, she explained why she left

Appeals avoided many of these landmines, but nonetheless read inferences from facts about what respondent knew of petitioner's illness and medication against petitioner and ignored an affidavit from petitioner. When this Court reads the opposition to certiorari filed by respondent, it needs to be aware that the "facts" recited therein were hotly disputed in the courts below.

Respondent's opposition brief simply drags the argument into the world of "he said/she said", something petitioner has contended all along belonged to the realm of a jury and not summary judgment. This petition, however, is about much more than simply a failure to follow Rule 56. It is about a precedent that threatens the family and medical leaves of workers who need time off because of the side effects of treatment and not simply because of the underlying serious health condition. It is also about whether time off from work to see a doctor in the Eighth Circuit is just as much a reasonable accommodation under the Americans with Disabilities Act as it is in other circuits, or whether such time off is not a reasonable accommodation because it "personally benefits" the employee in some way, as the Eighth Circuit erroneously reasoned. These are questions of no small

---

[on March 22] and Mitchell [a manager] said, 'this is the first time I've heard about any depression or anything.' (Pet. App. B at 37). The District Court then noted the contrary testimony of Pedersen and Mitchell, stating "Mitchell denied knowledge that Rask was suffering from depression[.]".. Id. The Court then held that "[d]espite the many conversations that Rask had with Pederson [Rask' supervisor] and Mitchell about her attendance and performance, Plaintiff did not mention that she was suffering from depression[.]"(Pet. App. B at 61)(emphasis added). In yet another place in its opinion, the District Court said, "Here, the record overwhelmingly reflects that Rask failed to notify Defendant of her depression[.]" (Pet. App. B at 60). The Court could only have reached this conclusion by accepting Pedersen and Mitchell's testimony and rejecting petitioner's, this on a mere paper record with no trial. The Supreme Court could never have intended such a use for Rule 56 when it decided the trilogy above.

importance to the average worker who could be healthy one day and in need of protected time off to see a doctor the next.

B. Respondent's Argument That The Court Held That Notice Of A Need For FMLA Leave Was Inadequate Because Petitioner Gave Respondent No Link Between The Medications And The Depression Is Factually Wrong, It Requires The Appellate Court To Have Ignored The Affidavit And Deposition Of Petitioner To The Contrary, And It Is An Invitation To Summary Reversal

Contrary to respondent's argument, the appellate court's holding on the sufficiency of the notice provided by petitioner of her need for FMLA leave depended *entirely* on whether the Court included notice of her medication's side effects in the equation. To suggest as respondent has that what the Court really meant to say was that the employer did not know that the medications were for the depression and so the two could not be linked for purposes of notice is not supported by the record.[2]

To reach respondent's conclusion, the Court would had to have ignored entirely petitioner's affidavit to the District Court in which she testified:

> "My depression was generally widely known at Fresenius and was well known to my supervisor Patty Pedersen. We discussed it on many occasions. We also discussed the medications I was taking and that they

---

[2] (Resp. Opp. Br at 24)("Without any evidence that Rask notified BMA of a causal connection between her medication side effects and her alleged depression, the Court of Appeals had no basis to treat the two as interrelated concepts within the notice analysis.")

> were for depression. I discussed with Ms. Pedersen how my depression affected my ability to concentrate, that I could not focus or think clearly and that I did not trust myself working with patients when the depression was at its most severe. When I worked at Eveleth there were numerous discussions at work with Ms. Pedersen present about my being on Prozac."

(Appellant's App. to Ct. of Appeals at 95-96)[3]

Petitioner also testified that she told her supervisor on May 28, 2004, just days before her termination: "I talked to Patty and I said, 'Patty, I'm having -- I talked to my doctor and they want me to come in tomorrow, I won't be able to work. I need help with my medication still, I'm still having a lot of side effects from what they put me on.'" (Appendix to Ct. of Appeals at 114 -- Rask depo. at 158).

The explanation of the Court's opinion offered by respondent therefore does not square with the record. To follow respondent's argument, the Court would have ignored the petitioner's record evidence and would have beyond any doubt violated Rule 56. The distinction respondent urges is an admission by respondent of error and is proper grounds for summary reversal by this Court. U.S. Sup. Ct. R.16.1.

Respondent complains that petitioner did not mention the FMLA (Resp. Opp. Br. at 22), nor did she get a doctor's note when she told them of her need to see the doctor (Resp.

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[3] (Cf. Resp. Opp. Br. at 4, fn.2, erroneously claiming that "Rask's assertion that she 'told her supervisor and her supervisor's manager of her depression and her requiring medication for its treatment' is simply not supported by the record.").

Opp. Br. at 5), but neither of these are required by the FMLA. 29 C.F.R. § 825.303(b) ("The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means.")

It was only when the Court of Appeals elected to parse the notice of depression from the notice of the effects of medication for the depression that the notice was held to be inadequate under the FMLA. That is where the Court erred and is where the decision threatens all who are treated for serious health conditions, suffer side effects from the treatment and need FMLA leave to see the doctor to fix the problem.

The issue becomes a jury question only because respondent disputes what petitioner told it. Unless summary judgment law has become so skewed that judges are now free to decide credibility on paper records, this case must be remanded to allow a jury to do what juries do best: decide who to believe.

C. Respondent's Argument That The Court Of Appeals Engaged In A "Fact Specific Analysis" on Petitioner's ADA Claim Requires That The Appellate Court Have Ignored Record Evidence From Petitioner And Would Allow For Summary Reversal By This Court

Respondent presents another argument for summary reversal when it attempts interpretation of the Court of Appeals' holding on the American's with Disabilities Act (ADA) claim. Respondent contends that the Court simply engaged in a "fact specific analysis" to come to the conclusion that there was no duty to reasonably accommodate petitioner's depression by providing her with time off to see

the doctor. (Resp. Opp. Br. at 16-17). If respondent were correct, this "fact specific analysis" would also have had to violate Rule 56 and would be an easy decision for the Supreme Court to summarily reverse.

The undisputed evidence shows that respondent failed to meet its duty to engage in an interactive process with petitioner to determine a reasonable accommodation. The Eighth Circuit has previously acknowledged that, "Under the ADA, an employer must engage in an interactive process to identify potential accommodations that could overcome the employee's limitations. *Burchett v. Target Corp.*, 340 F.3d 510, 517 (8th Cir. 2003. `[T]he failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith.'" *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1021 (8th Cir. 2000) (citation omitted). For the Court of Appeals to have engaged in a "fact specific" analysis, it would had to have ignored the undisputed evidence that respondent failed to engage petitioner in the very fact finding process that the appellate court previously said was required.

The Court would also have had to ignore the following facts of record:

> 1. Respondent had policies allowing for time off, including personal leave time ("PTO"), extended sick leave ("ESL") and FMLA time off. (Appellant's App. to Ct. of Appeals at 139-41). At the time of her termination, petitioner still had 48.5 hours of unused PTO available to her. (Appellant's App. to Ct. of Appeals at

> 86). The policies and the fact that petitioner had time available to her under the policies are prima facie evidence of an ability to accommodate.
>
> 2. Respondent did not replace petitioner for ten months after her termination, indicating that her presence was not so urgently needed as respondent suggests. (Appellant's App. to Ct. of Appeals at 38).
>
> 3. Respondent was overstaffed at the time petitioner requested time off to see her doctor. Respondent admitted this to the Court of Appeals when it argued the following: "She [Rask] knew her unit was overstaffed around the time of her discharge, and admits that a further hours reduction was something BMA 'could have done'[.]" (Resp. Br. to Court of Apps. at 41-42)

In *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002), this Court found that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases. . . Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."

A request for time off to see a doctor to have medications adjusted when a company is overstaffed and an employee has 48.5 hours of PTO time available to her under the company's own policies "seems reasonable on its face".

Barnett, *supra*. Being overstaffed, if respondent was concerned about short notice absences, it could simply have offered an alternative block of time off for petitioner, consistent with its time off policies, to get her medications straightened out. The interactive process discussed earlier allows the employer the opportunity to select the accommodation that works best. By failing to even engage in the process, however, respondent violated the ADA.

What is clear from the record is that respondent at no time offered any actual proof of any undue hardship caused by petitioner's three days of absence to meet its burden of proof under the ADA. Respondent never offered proof of any employees who worked any extra hours or found their shifts more burdened. It offered no proof of any additional expense. It offered only conclusory speculation.

Respondent's claim that the Court of Appeals found as a factual matter that petitioner did not give adequate notice of her disability to respondent sufficient to trigger a duty to reasonably accommodate would again be a basis for error if true. (Resp. Opp. Br. at 11). Respondent bases this argument on the erroneous factual assertion that petitioner never "offer[ed] specific evidence of any conversation in which she advised her supervisors that she had depression that was causally related to her absences." Id. This claim ignores the deposition testimony and affidavit of petitioner recited above in which she testified about those very conversations. (Appellant's App. to Ct. of Appeals at 95-96 – Rask affidavit, and 114 -- Rask depo. at 158). It also ignores the following testimony from petitioner:

> "She [Pederson] knew about my medication management, I was having problems with my medication, I was having side effects from my

> medication, and she knew I was, I was having problems and I needed to get my medication adjusted and she knew I was seeing a doctor about it, I let her know that."

(Appellant's App. to Ct. of Appeals at 109).

> "And then the next time I worked, Chris and Patty had a meeting with me, because they wanted to know why I left that day. And I explained in there and Chris was like, 'Well, this is the first time I've heard about any depression or anything,' and that's because Patty hadn't said nothing to her I guess.
>
> But I just kind of asked and let them know that I'm having problems with my medication and, you know, would you stand by me, I might miss a day here and there because of it, but, you know, I've been here for almost six years with this company, can you stand by me now. And when I left out there, it seemed like yeah, they would, you know.
>
> But the next time I talked to Patty, I called her and I said, "I can't make it, the doctor told me I can't go to work, I need to come in and have my medication redone[.]"

Id. Petitioner was fired a few days later. Id.

The above is beyond doubt a "real world" request for the accommodation of time off to see a doctor to get medications redone. The law imposed no requirement that she put the request in writing as respondent urges, nor was there any elegant form the law required her request to take.

The real issue on certiorari review of the ADA claim is the view by the Eighth Circuit that time off from work is not a reasonable accommodation because it benefits the employee personally. Respondent has no answer for this issue, other than to suggest that the Court must have engaged in fact finding and was not setting a "bright line rule". (Resp. Opp. Br. at 16-19).

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